INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	2
Statement	2
Reasons for Granting the Writ	9
Relief	16
Conclusion	16

APPENDICES

A—Opinion and Judgment of the Court of Appeals	1
B—Orders and Opinions of the Civil Aeronautics Board	14
C—Statutes and Regulations	34

CITATIONS

CASES:

Latin American Air Service, 6 C.A.B. 857 (1946)	5
Civil Aeronautics Board v. *State Airlines*, 338 U. S. 572 (1950)	9

STATUTES AND REGULATIONS:

Civil Aeronautics Act of 1938, as amended:	
Sec. 401(c) [52 Stat. 986, 49 U.S.C., § 457]	9
Sec. 1006 [52 Stat. 1024, 49 U.S.C., § 646]	3
Administrative Procedure Act of 1946:	
Section 10(e) [60 Stat. 243, 5 U.S.C., § 1009]	9
Section 5(a) [60 Stat. 239, 5 U.S.C., § 1004]	9
Economic Regulations of the Civil Aeronautics Board, Section 202.3 [14 F.R. 3522]	2, 5, 11, 12, 13, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

THE CITY OF DALLAS and DALLAS CHAMBER OF COMMERCE,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

CENTRAL AIRLINES, INC., THE CITY OF FORT WORTH, TEXAS, and FORT WORTH CHAMBER OF COMMERCE, *Interveners.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on May 20, 1954.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, rendered on May 20, 1954, is Appendix A hereof. Order No. E-7595 of the

Civil Aeronautics Board, which is under review, and the Opinion and Order No. E-7756 of the Board denying reconsideration of the Order under review, are in Appendix B hereof.

I. JURISDICTION

The judgment of the Court of Appeals was entered on May 20, 1954, and the order of that Court denying the petition for rehearing was entered on June 17, 1954. The time for filing this petition was extended from September 16, 1954, to and including November 13, 1954, by Justice Burton by an Order dated August 30, 1954. The jurisdiction of this Court is invoked under 28 USC 1254(1).

II. QUESTION PRESENTED

Have Petitioners been denied their statutory and constitutional right to notice and a hearing on the issue of whether scheduled air service, found by the Civil Aeronautics Board to be required at Dallas, should be restricted to service through the distant Fort Worth International Airport to the exclusion of all service through the close-in Dallas Love Field.

III. STATUTES AND REGULATIONS INVOLVED

1. Section 401(c) of the Civil Aeronautics Act of 1938, as amended, at p. 1 of Appendix C hereof.

2. Administrative Procedure Act of 1946, Sections 5 and 10, at p. 1 of Appendix C hereof.

3. Section 202.3 of the Economic Regulations of the Civil Aeronautics Board, at p. 35 of Appendix C hereof.

IV. STATEMENT

The present proceeding originated in a route certification proceeding entitled *Central Renewal Proceeding*, Docket No. 4083, *et al.* This proceeding involved the renewal of existing rights of Central Airlines and, inter alia, the ap-

plication of the carrier for a new local route between the terminal point Fort Worth, Texas, the intermediate points Dallas, Texas, Denton, Texas, Duncan, Oklahoma, Lawton-Fort Sill, Oklahoma, Chickasha, Oklahoma, and the terminal point Oklahoma City, Oklahoma to be known as Segment 5 of Route 81. The jurisdiction of the Court of Appeals was invoked under Section 1006 of the Civil Aeronautics Act of 1938, as amended. The question here presented arises from the extraordinary action of the Civil Aeronautics Board in specifying, in its order granting the certification of this route segment, that Dallas be served only through the Fort Worth International Airport, rather than through its own close-in airport.

1. Background

Some appreciation of the background of this case is necessary to an understanding of the significance of the Board's conduct in failing to give notice or seek evidence on the airport issue.[1]

Because Dallas is the major distribution center of the entire southwestern area of the United States, its economic growth is closely identified with the growth of its air transportation service. It consistently ranks among the top ten cities in the country as to air traffic, and is generally either first or second in the ratio of air passengers to population. In recent years, Dallas has been consistently generating roughly four times the amount of air traffic generated by Fort Worth. Dallas and Fort Worth are approximately 35 miles apart (from downtown center to downtown center). The basic economies of the two communities are different, there are no joint governmental functions or responsibilities, and there are no common municipal facilities serving the two areas. Each city has, and has always had, its own airport.

---

[1] Although the record in this case, not encompassing the airport issue, does not necessarily cover all of this non-controversial, background information, a hearing on this issue would result in entirely adequate evidence in support thereof.

Love Field, the terminal building of which is approximately seven miles from the heart of downtown Dallas, has been the Dallas municipal airport since 1928. The City of Dallas, prior to 1953, had invested approximately $6 million in the facilities of this airport. In 1947, the City Council of Dallas adopted a master plan for expansion and redevelopment of Love Field, a program which has been continuously under development since that time. In January, 1953, the taxpayers of Dallas overwhelmingly approved an additional bond issue in the amount of $10,500,000 for the further development of Love Field facilities. Contracts have been entered into and construction has commenced pursuant to this program.

The City of Fort Worth developed Meacham Field, located some six miles from downtown Fort Worth, as its airport. With the advent of 4-engine aircraft in the mid-1940's, the City of Fort Worth decided that it would be impractical to expand Meacham. Accordingly, late in 1947, it acquired the site for a new municipal airport located approximately 18 miles from both downtown Fort Worth and downtown Dallas. The City of Fort Worth extended its municipal boundaries to embrace the airport site. The new field, called Fort Worth International Airport (sometimes called "Amon Carter Field"), was completed in April, 1953, and airline service to Meacham Field was transferred thereto.

The City of Dallas has consistently improved and expanded Dallas Love Field with the result that it has a capacity and reliability equal to or greater than any other airline airport in North Texas. This has involved a very substantial investment financed by the citizens of Dallas in order adequately to serve their own air transportation needs. The citizens of Dallas have made no claim that the air service of any other community should be offered at their airport; but they are understandably concerned that an airline, authorized to serve Dallas and anxious to use Dallas Love Field, should be prohibited by the Civil Aeronautics Board from using that airport without an opportunity for the people directly affected to be heard. The

Order of the Board in this case, and the possibility of further such orders, is an eventuality for which Dallas was totally unprepared in embarking upon its recent airport improvement program.

2. Lack of Notice

In the present proceeding Petitioners had no reason to believe that there was any possibility that the Civil Aeronautics Board would order that Dallas traffic cannot be served through Dallas Love Field but must travel 11 additional miles to the Fort Worth airport. It has been the established policy of the Board to leave the initial decisions on selecting airports to airline management. This policy was well stated by the Board in *Latin American Air Service*, 6 C.A.B. 857, 893 (1946):

> "However, it is not the policy of the Board to prescribe in its certificates of public convenience and necessity the particular airport to be used by a carrier in providing the service required by the certificate. The choice of airport is a matter for determination by the carrier subject to compliance with the provisions of section 238.4 of the Board's Economic Regulations."

The Regulations referred to[2] provide a procedure whereby airlines, which desire to serve regularly a point named in their certificates through an airport not then regularly used by them, shall file an Airport Notice with the Board, serving it on the local authorities affected and other interested parties, thereby giving an opportunity for hearing to the many diverse local interests. Although the Board has on occasion designated airports in route certification orders, Petitioners were aware of no case, with the possible exception of local community and shuttle services built around airport-generated traffic, in which the Board had acted on an airline route application, which does not itself designate an airport, by issuing an order determining which of two or more airports shall be used to serve a par-

[2] Now renumbered Sect. 202.3 (Appendix C, p. 35).

ticular community. It is understandable, therefore, that the City of Dallas proceeded with its development plans on the assumption that the prospects for future success lay with the airlines and the habits of the air-travelling public and not with an arbitrary decision of the Federal Government, and that this assumption continued, in the absence of notice to the contrary, in the present proceedings before the Board.

The application of Central Airlines for the route segment here involved specified Fort Worth as a terminal and Dallas as an intermediate point, making no mention of particular airports. The Prehearing Conference, which is an established procedure of the Board designed to define the issues in the proceeding so that all interested parties will be effectively on notice, and recognized as such by the public, gave no hint that the airport question was in issue. The evidence and argument presented to the Examiner and the Board—by the hearings, by stipulation, by briefs and by oral argument—contained no indication that either the Board or any party to the proceeding was concerned with the question of specification of the airport to serve either Dallas or Fort Worth. The Initial Decision of the Examiner made no suggestion that the airport question was under consideration. The Board's Order on Route Segment 5 was the first indication that the Board had the airport question under consideration. In issuing its Order, the Board gave no explanation of its decision to prohibit service to Dallas traffic through Dallas Love Field.

3. Lack of Hearing and Substantial Evidence

As a consequence of the lack of notice, there was no opportunity for a hearing on the airport question, and the record is virtually empty of information which might have assisted the Board to understand the full scope and complications of that issue. The record indicates that the Examiner and all parties to the proceeding considered the Dallas and Fort Worth communities as separate entities,

each with its own traffic requirements and potentialities. The record also shows that the potential traffic at Dallas was a major consideration in determining that the public convenience and necessity required authorization of Central Airlines' Route Segment 5. The decision by the Board that the carrier should not be permitted to serve Dallas, the major traffic generating station on Route Segment 5, but must instead serve Dallas-Ft. Worth through the Fort Worth International Airport, could only have been made on the ridiculously superficial basis of comparative airline mileages to the two airports and comparative ground mileages and limousine fares from the downtown centers of the two cities to the Fort Worth International Airport and Dallas Love Field, respectively. From the Board's denial of the petition for reconsideration by Petitioners (Appendix B, p. 30) and from its Brief to the Court below, it appears that its decision was based on assumptions as to Government subsidy requirements and the adequacy of service to Dallas which could only have been drawn either from these totally inadequate and rudimentary facts or from information not appearing in the record of this case and not known to Petitioners.

This information, gleaned from various statistical sources without opportunity for cross-examination or argument on their significance to the airport question, cannot substitute for a hearing and does not meet the standards of substantial evidence necessary to support an administrative determination and order based on a hearing. In order to show the extent of its superficiality, it is necessary to indicate briefly the kind of evidence which is relevant to a determination of the adequacy of service to Dallas through the Fort Worth airport and of the effect of the airport restriction on the operating costs and revenues of Central Airlines as they affect Government subsidies:

1. The extent to which the travelling public uses Dallas Love Field in preference to Fort Worth Interna-

tional Airport in those instances in which air schedules provide an opportunity for comparison.

2. The proximity of the two airports in question to the originating points of traffic sources, e.g., residential districts, industrial establishments, other transportation terminals.

3. Projections of growth factors in both Dallas and Fort Worth, indicating future convenience of present airport locations.

4. Cost to the air travelling public of transportation to the respective airports, not merely of airport limousines but also of private cars and cabs which are used by approximately 75% of the Dallas traffic.

5. The adequacy of the Dallas Love Field facilities and the circumstances of its development at the expense of Dallas taxpayers, including plans for further improving the accessibility of Love Field to downtown Dallas by street and trafficway improvements which are already authorized or under construction.

6. Comparative figures of Central Airlines' operating costs, airport fees and other expenses at each of the two airports.

7. Projections of the probable effect on Central Airlines' revenues of traffic lost through failure to stop at Dallas Love Field. Recent submissions to the Board by local service carriers in other proceedings regarding estimated losses of revenue caused by failure to serve Dallas Love Field have been in direct conflict with assumptions apparently made by the Board with respect to savings in Government subsidy costs by eliminating Dallas Love Field.

None of the information indicated above was made available to the Board through the record in this case. Nonetheless, the Board has stated in its Brief to the Court below, which presumably may be taken as an explanation of its Order here complained of, that service to Dallas and Fort Worth through each city's own airport would increase the subsidy cost to the Government (no evidence was available on points 6 and 7 above) and that service to Dallas through Fort Worth International Airport would be adequate (no evidence was available on the first five points above).

V. REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decision Is in Conflict With the Decision of This Court in the State Case, Upon Which It Attempts to Rely

The opinion of the Court of Appeals, Appendix A hereof, was largely concerned with the question of the power of the Board to designate airports in route certification proceedings, an issue which Petitioners do not raise here. In addressing itself to the notice and hearing issue, however, the Court of Appeals opinion, which is divided on this point, relies entirely on *Civil Aeronautics Board* v. *State Airlines,* 338 U.S. 572 (1950). The result has been to place a construction on this Court's opinion in the *State* case which undermines in important respects the development by this Court and the Congress of the law of due process as it applies to the protection of those affected by the adjudication of administrative agencies.[4]

In the *State* case this Court held that notices of various route certification applications consolidated into a single proceeding were adequate notice that the Board might award routes originally applied for by State Airlines to Piedmont Aviation, Inc., which had not applied for them. In addressing the notice issue, the Court of Appeals, in its Opinion in the present case, made no mention of the

---

[4] Although it is not necessary to this Petition to examine the law of notice and hearing, the statutory basis is Sect. 401(c) of the Civil Aeronautics Act and Section 5(a) and 10(e) of the Administrative Procedure Act (Appendix C, p. 34).

many distinguishing features of that decision, but rather leaned heavily on the principle that in route certification proceedings the prime consideration is the public interest in establishing a sound transportation pattern (Appendix A, p. 7). However, when the interests of a local government in improving air transport service are believed by the Board, however erroneously, to be in conflict with the interests of the Federal Government in reducing subsidy costs, then lack of adequate notice can hardly be justified or excused by such a principle. This Court, in approving this principle in the *State* case, did not, it is believed, intend to expose the law of notice and hearing to the eroding effect indicated by the misuse of this principle by the Court below.

The principal features of the *State* case which make it inapplicable to the circumstances of Petitioners in the present case are these:

(a) State Airlines recognized the possibility of the Board's action. This Court said, 338 U.S. 572, 579, that "It seems to us from the entire record that State did fully recognize that Piedmont was a potential competitive applicant in the consolidated proceedings"; in the present case, there is no slightest indication in the record that Petitioners did or could have recognized that the Board Order might restrict service to Dallas to Fort Worth International Airport.

(b) The fitness and ability of Piedmont Aviation were the subject of considerable evidence of record in that case.

(c) This Court emphasized, 338, U.S. 572, 581, that the Board's opinions "show the painstaking consideration given this evidence [the experience and financial condition of the two airlines competing for the route in question]"; by comparison, the Opinion accompanying the Board's Order in the present case is silent as to that part of the Order here complained of for lack of notice and hearing.

(d) There was a degree of notice in the route application in question in the *State* case, inasmuch as it included a request for "such modification of such routes" as the Board may require, which the Court considered to encompass the added routes; the applications involved in the *Central* case could in no event be construed to encompass the exclusion of the most heavily used airport at the route's terminal.

(e) There was a further degree of notice when the Board consolidated all route applications for that area into one proceeding.

Perhaps the most important distinction between the two cases lies in the fact, mentioned in Part IV above, that Petitioners relied upon, and should have relied upon, the established policy and practice of the Board to leave to airline initiative the selection of airports, in accordance with the procedure set forth in Section 202.3 of the Board's Economic Regulations (Appendix C, p. 35) and within the limitations of route certificates awarded by means of quite different proceedings designed to determine the public convenience and necessity for service to communities on the routes. The dissenting opinion in the Court below, p. 12 of Appendix A hereof, speaks clearly on this point:

> "It seems to me that Dallas had a right to rely upon the established procedure in respect to the designation of the airport to be used. It had a right to expect, in the absence of any notice to the contrary, that, after the terminal points and other issues in the certification proceeding had been concluded, the selection of airports would be another step to be taken pursuant to an 'airport notice'. Dallas had no semblance of a notice that, contrary to the established procedure, the selection of the airport would be dealt with in the same order which specified the terminal points. It seems to me that Dallas was entitled to that notice."

In the *State* case the action complained of for lack of notice, namely, awarding a route not specified in the application, was clearly of the same character as the action as to which full notice was undeniably given, namely, the award of routes applied for.

2. The Effectiveness of Judicial Review of the Notice and Hearing Practices of the Civil Aeronautics Board are Thrown Into Doubt by the Court of Appeals Decision, Which Invites Extensive Clarifying Litigation

The Court of Appeals decision in effect says that notice of a route certification proceeding is notice that the Board may, despite its established policies and published regulations providing for quite different proceedings for airport determinations, so phrase its designation of routes as to prohibit service to communities through their airports which are in active use and meet every standard of safety and adequacy. The notion that notice of a route certification proceeding is notice that the Board may designate one of two or more airports for exclusive use is belied by the existence and past use of an established procedure for selecting airports; in its own regulations the Board has recognized the difference in character between route determinations and awards and the matter of airport selection.[5] If the principle is established by the decision of the Court below that route certification notices are adequate notice of airport determinations, then the door is open for the Board to do virtually anything within its powers, without notice or hearing, incidentally to awarding routes. If the Board elects to operate within the latitude opened up by the decision of the Court below, the result could only be future litigation which this Court can forestall at this time.

---

[5] Section 202.3 of the Economic Regulations (Appendix C, p.35).

3. The Affirmation by the Court of Appeals of the Board's Order Has the Effect of Exposing All Municipalities Within 20 Miles of More Than One Airport to the Burden of Preparing Their Cases on the Relative Merits of the Airports, Whenever They are Put on Notice of a Route Proceeding Involving Air Service to Their Communities

Many important civil air centers in the United States have more than one airline airport within a radius of 20 miles. It is indeed alarming to each of them if they now face the possibility, to which Petitioners have been subjected, of a denial of service to the airport handling the largest part of their air traffic through a specification in a Civil Aeronautics Board route certificate, arrived at after no other notice than that of the route certification application. It may be assumed that, like Petitioners, these municipalities have come to rely upon the established policy of the Board to leave to airline management the initial determination of which airports to use, subject to the safeguards to the public interest provided in the long-established airport notice procedure provided in the aforesaid Section 202.3 of the Board's Economic Regulations and subject to the Board's determination in route certification proceedings as to which communities require air service.

An indication of the extent of the burden which could be imposed on municipalities by allowing the Board's conduct in the present case to stand confirmed by the Courts may be found in the present circumstances of Petitioners. In four different route certification proceedings,[6] Petitioners are involved in various procedural efforts either to preclude the Board from further orders arbitrarily transferring traffic from Dallas Love Field to Fort Worth International Airport or, alternatively, to obtain a full hearing on the merits of the airport issue as it arises in each

---

[6] *Trans-Texas Certificate Renewal Case*, Docket No. 6485, *et al.*;
Reopened Fayetteville Case, Docket No. 5592, *et al.*;
Additional Southwest-Northeast Service Case, Docket No. 2355, *et al.*;
Pioneer Renewal Case, Docket No. 6786, *et al.*

proceeding in the context of each of the different routes involved.

Accordingly, it is submitted that the decision of the Court below has a deeply unsettling effect on the relations between the major air traffic centers of the country and the Civil Aeronautics Board.

4. The Failure of the Board to Provide Notice and a Hearing on the Airport Issue Has a Special Significance to This Court in That the Board's Action Complained of for Lack of Notice and a Hearing Is One Which in Itself Is an Encroachment of the Federal Government on the Affairs of Local Government and Private Airline Enterprise

As pointed out above, the Board has a well-established policy of reliance on airline management, responsive to the demands of traffic found by the Board to require air service, to determine the airport best suited to its operations and the needs of a particular community on a certificated route. This policy, as reflected in the above-described airport notice procedure, balances the national public interest, the local public interest and the interests of the airlines concerned by means of a procedure which gives the Board, the municipality concerned and other interested parties one month to oppose a proposal by the airline to use a new airport.[7] Thus, the Board plays a negative role confined to avoiding damage to the public interest, and the municipalities are given an opportunity to be heard, if they so desire.

The extraordinary step which the Board has taken in this case, in sharp contrast to announced policies and procedures of the Board, has no parallel instance in the Board's past operations that Petitioners have been able to discover. It may be that Respondent will offer to this Court, as they did in their Brief to the Court below, its long list of instances of airport specifications in Board Route Certification Orders. If the list would be the same, none of them

[7] Section 203.3 of the Board's Economic Regulations (Appendix C, p. 35).

involve an order by the Board, unsupported by the preferences of the airline route applicant, that in effect prohibits service to a certificated community through the airport which has theretofore handled a major part of the traffic of that community, as in the case at hand. *A fortiori*, there is no case approaching the present situation wherein the excluded airport is the only airport of the community certificated, has handled all of that community's air traffic, and the designated airport is 11 miles further away and within the limits of a neighboring municipality which generates far less traffic. The cases named by the Board to the Court below appear to be instances (a) in which the Board has named the only airport to avoid the necessity of naming, as a route point, any one of several small communities near the airport in preference to another, (b) in which only inter-airport helicopter shuttle service or commuting service was involved, and (c) in which transocean flight requires specification of separate land and sea landing points.

The total disregard of local preferences with regard to the denial of service to Dallas Love Field, the failure to take any testimony from the local citizens and businesses affected, and the failure to obtain the expert testimony of Central Airlines on estimated effects on its operating costs and revenues, establish the airport designation in the Board's order in the *Central Renewal Case* as arbitrary and capricious, and indicate a total disregard for the views of persons and organizations directly affected and in possession of the information needed for an intelligent decision.

Assuming as we must that this action was not deliberately discriminatory, it must be concluded that the Board had adopted a new and unrestrained policy and attitude. Although the power of the Board to designate airports is not here challenged, the abrupt and unannounced manner in which it has apparently reversed sound, widely understood policy has a direct bearing on the significance of the notice question herein raised.

Accordingly, it is imperative that the Board be restrained and guided by this Court with respect to its procedural conduct in this case.

VI. RELIEF

In the event that a Writ of Certiorari should be granted, Petitioners intend to confine their prayer to this Court for relief to that part of Order No. E-7595 of the Civil Aeronautics Board, which restricts air transport service to the City of Dallas on Segment 5 of Route No. 81 to the Fort Worth International Airport, and do not intend to include the alternative relief requested of the Court of Appeals, namely, that Order No. E-7595 be set aside in its entirety.

VII. CONCLUSION

For the foregoing reasons, it is respectfully urged that the error of the Civil Aeronautics Board and the Court of Appeals in denying Petitioners an opportunity to be heard on the issue of restricting service to Dallas to the Fort Worth International Airport has consequences of such general application and importance that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRACKLEY SHAW
Attorney for the City of Dallas and Dallas Chamber of Commerce

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11968

THE CITY OF DALLAS AND DALLAS CHAMBER OF COMMERCE, PETITIONERS

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

CITY OF FORT WORTH, TEXAS, AND THE CHAMBER OF COMMERCE OF FORT WORTH, TEXAS, INTERVENORS

CENTRAL AIRLINES, INC., INTERVENOR

On Petition for Review of Order of the Civil Aeronautics Board

---

Decided May 20, 1954

Mr. Thomas F. Daly, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of Court, with whom *Messrs. Joseph W. Wyatt, Samuel C. Caldwell, Harry A. Inman*, and *John R. Mahoney* were on the brief, for petitioners.

Mr. James L. Highsaw, Jr., Chief, Litigation and Research Division, Civil Aeronautics Board, with whom *Messrs. Emory T. Nunneley, Jr.*, General Counsel, Civil

Aeronautics Board, and *John H. Wanner,* Associate General Counsel, Civil Aeronautics Board, were on the brief, for respondent. *Mr. Charles H. Weston,* Attorney, Department of Justice, entered an appearance for respondent.

Mr. Cecil A. Beasley, Jr., with whom *Mr. Dyer J. Taylor* was on the brief, for intervenors City of Fort Worth, Texas, and the Chamber of Commerce of Fort Worth, Texas. *Mr. Eugene B. Thomas, Jr.,* entered an appearance for intervenors City of Fort Worth, Texas, and the Chamber of Commerce of Fort Worth, Texas.

Mr. Robert W. Oliver for intervenor Central Airlines, Inc.

Before EDGERTON, PRETTYMAN and BAZELON, Circuit Judges.

BAZELON, *Circuit Judge:* Central Airlines applied to the Civil Aeronautics Board for authorization to operate a new route segment between the terminal points of Fort Worth, Texas, and Oklahoma City, Oklahoma, via five intermediate points, one of which was Dallas, Texas. After full public hearing, the Board entered an order granting the requested authority, except that Dallas and Fort Worth, which are thirty-one miles apart, were treated as a single terminal point with this designation: "Dallas-Fort Worth, Tex. (to be served through the Amon Carter Air Field)." Amon Carter Field[1] is Fort Worth's newly constructed municipal airfield and is located approximately midway between Dallas and Fort Worth.

The Dallas Chamber of Commerce, an intervenor in the proceedings before the Board, and the City of Dallas, which, jointly with the Chamber of Commerce, filed an unsuccessful petition for reconsideration, are the petitioners herein. Their interest stems from a concern that Dallas will not be well served by Amon Carter, which is

[1] Also known as Fort Worth International Airport.

eleven miles farther from Dallas than is its own municipal airport, Love Field, and their apprehension lest the Board's action jeopardize Dallas' substantial investment in Love Field.

Petitioners first attack the Board's order on the theory that the Board is without statutory authority to require Dallas-Fort Worth to be served through Amon Carter. This contention derives from their view that airports must be considered "facilities" within the meaning of the fourth sentence of § 401(f) of the Civil Aeronautics Act,[2] which provides:

> "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require."

While, for reasons set forth in the margin,[3] we do not believe that "facilities" as there used embraces "air-

---

[2] 52 STAT. 977, 989 (1938), 49 U.S.C. § 481(f) (1946).

[3] In support of their position, petitioners point to the definitions section of the Act, where, at § 1(7) and (8), the term "air navigation facility" is defined as including "landing areas" and "airports." (52 STAT. 977 (1938), 49 U.S.C. § 401(7) and (8) (1946)) However, elsewhere in the definitions section, at § 1(22, where "landing area" is defined, "facilities" is used to refer to things appurtenant to the airport rather than to the airport itself. (52 STAT. 979 (1938), 49 U.S.C. § 401(22) (1946)) Since § 401(f), *supra*, speaks of "facilities" and not "air navigation facilities," we think that the statutory definitions, if anything, militate against rather than for petitioners' contention. Moreover, turning to Title IV of the Act, in which § 401(f) is included, we find that in at least one instance "facilities," as used therein, could not have been intended to include "airports." Thus, § 404(a) makes it the duty of a certificated carrier "to provide safe and adequate service, equipment, and facilities in connection with [the authorized] transportation." (52 STAT. 993 (1938), 49 U.S.C. § 484(a) (1946)) Clearly, Congress did not intend for carriers to provide their own "safe and adequate" airports. On the other hand, the term "air navigation facilities" does not appear in Title IV, but is used in Titles III and VI

ports," there is no need to reach that question. For we agree with the Board that the present order, in providing that service to Dallas-Fort Worth shall be through Amon Carter, has not imposed a "term, condition, or limitation" on Central. Rather, it has merely described the "points" and the "service to be rendered," as expressly authorized by the first sentence of § 401(f), *supra*, which provides:

> "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered * * *."

The temporary certificate issued by the Board, after describing the transportation authorized, states: "The service herein authorized is subject to the following terms, conditions, and limitations." The restriction of service to Dallas-Fort Worth through Amon Carter does not appear among such "terms, conditions, and limitations," but is found in the first part of the order, where the authorized transportation is described.

While, of course, the mere form of the Board's order would not be controlling if its substance were in conflict with the terms of the Act, we find no such conflict. The Board has heretofore, without challenge, assumed and exercised a power of control over changes in airports by certificated carriers,[4] and it would be paradoxical, indeed,

---

where the Administrator of Civil Aeronautics, the Secretary of Commerce, and the Board are vested with broad power to establish, develop, and maintain "air navigation facilities," specifically including airports, and to regulate such "air navigation facilities" in the interest of safety. (See 52 STAT. 985, 986, 1011 (1938), 49 U.S.C. §§ 451, 452, 455, 457 (1946)) Had Congress regarded the word "facilities," without more, as embracing airports, it would not have devised and painstakingly defined a new term (*i.e.*, "air navigation facility") when it sought to create and delimit a broad regulatory power encompassing, *inter alia*, airports.

[4] 14 C.F.R. § 202.3 (1952).

if the Board were without jurisdiction to designate the airport to be served in the first instance. Moreover, we think nothing in the Act precludes the certification of service to an airport as a "point," as the Board has done on several occasions.[5] The "air transportation" regulated under the certificate provisions of § 401 is defined by the Act as the carriage by aircraft of persons, etc., between *places*, and not necessarily between cities.[6] Since we believe the Board has authority to designate service to an airport as a point, it would be wholly anomalous to invalidate the present order because, in form, it does not designate Amon Carter, itself, as a terminal point.

Finally, even if the Act left some ambiguity concerning the Board's power to enter the order in question, we would favor the broader view of the Board's power as essential to secure a system of air transportation in the public interest.[7] Specifically, we believe that where, as here, the Board concludes that the public interest requires two or more contiguous cities to be served as a single point, it should not be precluded from specifying the one airport which will best serve the entire area designated.[8] We think it is precisely to permit such prescribing of authorized service that the first sentence of § 401 (f) empowers the Board to attach to certificates "such

---

[5] See, *e.g.*, Alaska Air Transportation Investigation, 3 C.A.B. 804 (1942); Middle Atlantic Area Case, 9 C.A.B. 131, 179-80 (1948).

[6] 52 STAT. 978-79 (1938), 49 U.S.C. § 401(10), (20) (1946).

[7] Cf. Civil Aeronautics Board v. State Airlines, 338 U.S. 572, 578, 580 (1950).

[8] The Board has assumed that it possessed such power in a number of cases. See, *e.g.*, Texas-Oklahoma Case, 7 C.A.B. 481, 539-40 (1946); Trans-Texas Certificate Renewal Case, 12 C.A.B. 606 (1951); Alaska Route Modification Case, Order E-7460, March 23, 1953; Indiana-Ohio Local Service Case, Order E-7184, February 20, 1953. Were the Board without such power in the present case, it would be possible for Central to choose to use Meacham Field at Fort Worth, thereby in effect vitiating the Board's order that service should be afforded to Dallas as well as Fort Worth.

reasonable terms, conditions, and limitations as the public interest may require."[9]

Petitioners next assert that they were not given sufficient notice that the issue of service through Amon Carter Field was before the Board;[10] and that such lack of notice constituted a violation of the Administrative Procedure Act[11] and a denial of due process. Although the issue of service through Amon Carter was not specifically raised by Central's application or at the pre-hearing conference, we think that, nonetheless, within the principle enunciated and applied by the Supreme Court in *Civil Aeronautics Board* v. *State Airlines*,[12] adequate notice was provided. In that case, Piedmont Aviation, Inc., and State Airlines had applied for different new routes in a geographical area including all or a part of fourteen states in Southeastern United States. After consolidated hearings on the applications of State, Piedmont, and some twenty-three other applicants for routes in the same general area, the Board awarded Piedmont new routes not specifically sought in its application and more nearly approximating those sought by State. State attacked this order on the ground, *inter alia*, that since Piedmont had not applied for the particular routes certified, State had had insufficient notice that the Board might consider Piedmont as a competing applicant, and hence had had no fair opportunity to present evidence discrediting Piedmont's fitness to serve those routes.

The Supreme Court held that there was sufficient notice

---

[9] 52 STAT. 988 (1938), 49 U.S.C. § 481(f) (1946).

[10] Specifically, petitioners contend that no specific notice was given that the following issues would be determined: whether Central should be limited to serving Dallas through Amon Carter Field and denied the right to use Love Field; and whether operation to and from Amon Carter would constitute adequate service to Dallas.

[11] 60 STAT. 239 (1946), 5 U.S.C. § 1004 (1952).

[12] 338 U.S. 572, 578-81 (1950).

to State, even though Piedmont's application covered routes "differing markedly from those awarded."[13] In so holding, the Court approved the principle stated by the Board that in certification proceedings the prime consideration is the public interest in the establishment of a "sound transportation pattern," and not "'how an individual proposal would benefit the applicant * * * .'"[14] Reasoning from this principle, the Court concluded that the requirements of notice are satisfied when interested parties are sufficiently informed of the issues so that they may present evidence which will enable the Board to reach its decision on the basis "of all available information." In finding that under this test State had received adequate notice, the Court noted: (1) State had sought certificates in the same general area, was a participant in the same proceedings, and had argued against Piedmont before the Board—in short, it recognized Piedmont as a potential competitive applicant; and (2) the Board, in the exercise of its informed judgment, had denied State's petition for reopening of the proceedings in order to present evidence bearing on Piedmont's qualifications.

In the present case, petitioners likewise had notice of the certificate proceedings and participated therein. They knew, of course, that Amon Carter Field was under construction.[15] They should have been aware, from past ex-

---

[13] 338 U.S. at 577.

[14] Southeastern States Case, 8 C.A.B. 716, 722 (1947), quoted, 338 U.S. at 580. This principle may not, however, be read as in any way implying that even where the consequences to interested individuals of a Board's order are manifestly unjust, the Board's determination must be conclusive merely because couched in terms of "public interest." "Fair play," as well as "sound transportation," is a component of the public interest.

[15] The City of Dallas sought unsuccessfully to block the construction of Amon Carter Field in proceedings before the Administrator of Civil Aeronautics. In the Matter of the Hearing of the Petition of the City of Dallas, Texas, Protesting the Location of the North Texas Airport (1948). See City of Dallas v. Rentzel, 172 F.2d 122 (5th Cir. 1949).

periences in Board proceedings, that Dallas-Fort Worth might be designated as a single point,[16] and that service to Dallas-Fort Worth through Amon Carter might be required by the certificate.[17] Moreover, at the hearing, itself, officials of Central were questioned at length as to the location of Amon Carter, its stage of completion, and Central's plans regarding service to it when completed. This obvious interest of the Board in Amon Carter, coupled with its known practice of prescribing service to points through particular airports, must be deemed to have sufficiently alerted petitioners to the possibility that service might be certificated to Dallas-Fort Worth through Amon Carter.

These circumstances, we think, preclude the view adopted by our dissenting brother that petitioners had a right to expect that the designation of the airport would be the subject of a subsequent hearing pursuant to an "airport notice" filed by the carrier. The "airport notice" procedure[18] was not and could not have been relied on by petitioners. It applies only when the holder of a certificate desires to serve a point named in the certificate through an airport not then regularly used by the holder. Since it comes into play only on the filing of an "airport notice" by the holder, that procedure plainly is inapplicable where, as here, the Board has determined that service by the holder to a point named in the certificate should be through a particular airport.

---

[16] Dallas-Fort Worth had been designated a single point in other proceedings before the Board: American Airlines, Inc.—Temporary Certificate of Public Convenience and Necessity, 3 C.A.B. 415, 419 (1942); Latin American Air Service Case, 6 C.A.B. 857, 921, 925 (1946); and Braniff Airways, Inc., Route No. 15 Restriction, 6 C.A.B. 515, 520 (1945).

[17] Petitioners had previously participated in proceedings in which the Board had specified that points should be served through designated airports. See, *e.g.*, Trans-Texas Certificate Renewal Case, 12 C.A.B. 606 (1951). See also note 8, *supra*.

[18] 14 C.F.R. § 202.3 (1952).

Furthermore, as in *State Airlines,* the Board here considered petitioners' proffer of additional evidence when it denied their petition to reopen the proceedings and for reconsideration. Their petition stated that they were prepared to produce evidence (1) that service to Dallas through Amon Carter would not be adequate, and (2) that, if one airfield was to serve both cities, Love Field at Dallas, rather than Amon Carter, would minimize the cost to the public and would offer the more convenient service. The petition did not, however, indicate specifically the nature of the evidence to be submitted, although it was perhaps implied that data reflecting the greater volume of Dallas traffic would be offered. Since such data was already before the Board, and since no other evidence was specified, we find that, as in *State Airlines, supra,* the Board was justified in declining to reopen the proceedings.[19]

In effect, petitioners' final objection—that the Board's order is not supported by substantial evidence—comes to this: that there is missing from the record the evidence they would have presented but for the alleged lack of notice that service to Dallas through Amon Carter was in issue.

Particularly, they say, there was insufficient evidence (1) to support the finding that Amon Carter Field would adequately serve Dallas; or (2) to enable the Board, in computing the amount of subsidy savings to the public, to appraise the adverse effects on Central's revenues

---

[19] The Board's supplemental opinion denying the petition for reconsideration makes clear that the Board had duly considered the objections raised by petitioners. The Board stated: "In reaching this decision we considered, among other matters, the fact that the subsidy cost to the Government would increase substantially if the new service * * * were provided through separate airports. * * * By the time of our decision, Central was providing service to Dallas and Fort Worth through three separate airports. The record also indicated that the facilities available at Amon Carter and its location and convenience were such as to provide adequately * * * for local service to both Dallas and Fort Worth."

which would result from the loss of Dallas traffic. But we think the evidence in the record clearly demonstrates that Amon Carter was sufficiently accessible to Dallas to serve its needs adequately, and, accordingly, that the loss of Dallas traffic would be inconsequential.[20]

Affirmed.

PRETTYMAN, *Circuit Judge*, dissenting: I would remand this case for further hearing on the airport question. In one sentence the Board's order from which this appeal was taken specified the terminal point and designated the airport to be used. I think sufficient notice that the airport question was to be decided in this proceeding was not given.

Central Airlines' application for a certificate was for a route "Between the terminal point Fort Worth, Texas, the intermediate points Dallas, Texas, Denton, Texas, * * *." It said nothing about the airport to be used. The report of the prehearing conference was to the same effect. This was the extent of the notice given as to the nature and scope of the hearing to be held.

No specific notice was given that the Board might designate Dallas-Fort Worth as the terminal point. Nevertheless, under the doctrine of the *State Airlines* case,[1] we are compelled to conclude that Dallas and all other parties had ample notice that, instead of specifying Fort Worth as the terminal point and Dallas as an interme-

---

[20] Certain documents and materials were incorporated into the record by stipulation. Among such materials considered by the Board were: (1) data regarding runways, navigational aids, etc., available at Amon Carter Field and Love Field; (2) distances and ground transportation from Fort Worth and Dallas to Amon Carter Field and Love Field; and (3) lists of airports located fifteen or more miles from points served, together with ground transportation times and fares involved; and (4) estimated operating costs of Central from which could be deduced the added subsidy costs involved if Dallas and Fort Worth were to be served separately.

[1] Civil Aeronautics Board v. State Airlines, 338 U.S. 572, 94 L.Ed. 353, 70 S.Ct. 379 (1950).

diate point, the Board might combine the two and designate Dallas-Fort Worth as the terminal point.

But the question of what airport should be used to serve the designated terminal point was a different question. In its brief the Board tells us:

> "Under the terms of each carrier's certificate in effect since the beginning of the administration of the Civil Aeronautics Act, a carrier after being authorized to serve a new point is required to file with the Board an 'airport notice' notifying the Board of the airport selected by it to serve the new point. Under the Board's practice the carrier is permitted to use that airport if (a) the airport is suitable for the purpose when compared with other available airports in the vicinity, and (b) the airport does in fact serve the designated point."

The designation of "Dallas-Fort Worth" as a terminal was, as the Board phrased it in the Supplemental Opinion dated September 24, 1953, "a designation of service to Dallas and Fort Worth as a single rather than separate points." If this was authorization of service to "a new point", the above quotation from the Board's brief applies directly and specifically. If it was not designation of a new point, but was merely service by a new airport to two points already served, the Airport Regulations[3] apply specifically. Those Regulations apply in terms to cases where a carrier desires to serve a point already named in the certificate but "through the use of any airport not then regularly used by such holder," i.e., carrier. Central was serving Dallas and Fort Worth but at Love and Meacham Fields; Amon Carter Field was an airport not then regularly used. In either event, whether "Dallas-Fort Worth" is a new point or is merely the two old points served by an airport not heretofore regularly used, the designation of the airport is a separate proceeding from the grant of the certificate. Thus, according to

---

[3] 14 Code Fed. Regs. § 202.3.

the Board's statement and its Regulations, the choice of airports is a problem to be considered in "airport notice" proceedings, separately from other issues in a certification proceeding. Of course, if the notice in the certification proceeding had contained notice of the airport issue, I suppose the two questions could have been combined in a single proceeding. But that was not done in this case.

It seems to me that Dallas had a right to rely upon the established procedure in respect to the designation of the airport to be used. It had a right to expect, in the absence of any notice to the contrary, that, after the terminal points and other issues in the certification proceeding had been concluded, the selection of airports would be another step to be taken pursuant to an "airport notice". Dallas had no semblance of a notice that, contrary to the established procedure, the selection of the airport would be dealt with in the same order which specified the terminal points. It seems to me that Dallas was entitled to that notice.

In its petition for reconsideration Dallas offered to present evidence "showing first, that service of Dallas through Fort Worth International Airport (Amon Carter Field) is not and in the circumstances will not be adequate service required by Section 404 of the Act, and second, that if under the peculiar circumstances of any case both Dallas and Fort Worth are to be served through a single airfield, the public interest requires that Love Field should be the field used for that purpose in view of the much greater volume of available traffic to and from Dallas than to and from Fort Worth." In its memorandum denying reconsideration the Board did not treat of this proffer of evidence but merely referred to facts which it said were indicated in the record.

I would remand the case for further hearing upon the airport question and for a redetermination of that question pursuant to the established procedure and regulations relating thereto.

Filed May 20, 1954

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1954

No. 11,968

THE CITY OF DALLAS and DALLAS CHAMBER OF COMMERCE, *Petitioners*

v.

CIVIL AERONAUTICS BOARD, *Respondent*

CITY OF FORT WORTH, TEXAS, and THE CHAMBER OF COMMERCE OF FORT WORTH, TEXAS, *Intervenors*

CENTRAL AIRLINES, INC., *Intervenor.*

On Petition for Review of Order of the Civil Aeronautics Board

Before: Edgerton, Prettyman, and Bazelon, Circuit Judges.

Judgment and Decree

This cause came on to be heard on the transcript of the record from the Civil Aeronautics Board, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is adjudged and decreed by this Court that the order of the Civil Aeronautics Board on review in this case be, and the same is hereby, affirmed.

Dated: May 20, 1954.

Per Circuit Judge Bazelon.

Separate dissenting opinion by Circuit Judge Prettyman.

APPENDIX B[1]

Order No. E-7595

Order No. E-7595

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board
at its office in Washington, D. C.,
on the 31st day of July, 1953

Docket No. 4083, *et al.*

In the matter of the
CENTRAL RENEWAL PROCEEDING

Order

A full public hearing having been held in the above-entitled proceeding, and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions and decision, which is attached hereto and made a part hereof;

IT IS ORDERED:

1. That amended certificates of public convenience and necessity in the forms attached hereto be issued to Central Airlines, Inc., for route No. 81 and to Continental Air Lines, Inc., for route No. 29;

2. That said amended certificates shall be signed on behalf of the Board by its Chairman, shall have affixed thereto the seal of the Board attested by the Secretary and, subject to the extension of their effective dates in accordance with the provisions of said amended certificates, shall be effective on September 29, 1953;

---

[1] The only opinion of the Civil Aeronautics Board which is addressed to that part of Order No. E-7595 (item 5 of the Certificate attached to the Order) is the Opinion with the Order denying reconsideration (Appendix B, p. 18). The Opinion accompanying Order No. E-7595 is not pertinent to this Petition and, has not been printed herein.

3. That the applications of Continental Air Lines, Inc., Trans-Texas Airways, and Pioneer Air Lines, Inc., deferred in paragraph 5 of Order No. E-7177, dated February 19, 1953, be and they hereby are dismissed;

4. That, except to the extent heretofore granted or dismissed herein, all applications heard in this proceeding be, and they hereby are, denied.

By the Civil Aeronautics Board:

M. C. MULLIGAN
Secretary

(SEAL)

Order No. E-7595

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Temporary Certificate of Public Convenience and Necessity for Local Service (as amended)

CENTRAL AIRLINES, INC.

is hereby authorized, subject to the provisions hereinafter set forth, the provisions of Title IV of the Civil Aeronautics Act of 1938, as amended, and the orders, rules and regulations issued thereunder, to engage in air transportation with respect to persons, property and mail, as follows:

1. Between the terminal point Amarillo, Tex., the intermediate points Borger, Tex., Woodward, Enid, Ponca City and Bartlesville, Okla., and the terminal point Tulsa, Okla.;

2. Between the terminal point Tulsa, Okla., the intermediate points Muskogee and McAlester, Okla., Paris, and Dallas, Tex., and the terminal point Fort Worth, Tex.;

3. Between the terminal point Wichita, Kans., the intermediate points Ponca City, Enid, Oklahoma City, Shawnee, Ada and Ardmore, Okla., Sherman-Denison and Dallas, Tex., and the terminal point Fort Worth, Tex.;

4. Between the terminal point Tulsa, Okla., the intermediate point Stillwater, Okla., and the terminal point Oklahoma City, Okla.;

5. Between the terminal point Oklahoma City, Okla., the intermediate points Chickasha, Lawton-Fort Sill, and Duncan, Okla., and the terminal point Dallas-Fort Worth, Tex. (to be served through the Amon Carter Air Field),

to be known as Route No. 81.

The service herein authorized is subject to the following terms, conditions and limitations:

(1) The holder shall render service to and from each of the points named herein, except as temporary suspensions of service may be authorized by the Board; and may begin or terminate, or begin and terminate, trips at points short of terminal points.

(2) The holder may continue to serve regularly any point named herein through the airport last regularly used by the holder to serve such point prior to the effective date of this certificate, as amended. Upon compliance with such procedure relating thereto as may be prescribed by the Board, the holder may regularly serve a point named herein through any airport convenient thereto.

(3) On each trip operated by the holder over all or part of one of the four numbered route segments in this certificate, as amended, the holder shall stop at each point named between the point of origin and point of termination of such trip on such segment, except a point or points with respect to which (a) the Board, pursuant to such procedure as the Board may from time to time prescribe, may by order relieve the holder from the re-

quirements of such condition, (b) the holder is authorized by the Board to suspend service, or (c) the holder is unable to render service on such trip because of adverse weather conditions or other conditions which the holder could not reasonably have been expected to foresee or control.

The exercise of the privileges granted by this certificate, as amended, shall be subject to such other reasonable terms, conditions and limitations required by the public interest as may from time to time be prescribed by the Board.

This certificate, as amended, is issued pursuant to a determination of policy by the Civil Aeronautics Board that in the discharge of its obligation to encourage and develop air transportation under the Civil Aeronautics Act, as amended, it is in the public interest to establish certain air carriers who will be primarily engaged in short-haul air transportation as distinguished from the service rendered by trunkline air carriers. In accepting this certificate, as amended, the holder acknowledges and agrees that the primary purpose of the certificate, as amended, is to authorize and require it to offer short-haul air transportation service of the character described above.

This certificate, as amended, shall be effective on September 29, 1953, and shall continue in effect up to and including February 19, 1956: *Provided*, however, That prior to the date on which the certificate, as amended, would otherwise become effective the Board, either on its own initiative or upon the timely filing of a petition or petitions seeking reconsideration of the Board's order of July 31, 1953 (Order No. E-7396), insofar as such order authorizes the issuance of this certificate, as amended, may by order or orders extend such effective date from time to time.

IN WITNESS WHEREOF, the Civil Aeronautics Board has caused this certificate, as amended, to be executed by its Chairman, and the seal of the Board to be affixed hereto,

attested by the Secretary of the Board, on the 31st day of July, 1953.

/s/ Oswald Ryan
OSWALD RYAN
Chairman

(SEAL)

ATTEST:
/s/ M. C. Mulligan
Secretary

Supplemental Opinion and Order on Reconsideration. Dated September 24, 1953

Order No. E-7756

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 24th day of September, 1953

Docket No. 2936, *et al.*

In the matter of the
ADDITIONAL NORTH-SOUTH SERVICE TO TULSA CASE

Docket No. 3094, *et al.*

In the matter of the
WICHITA FALLS-DALLAS SERVICE CASE

Docket No. 4083, *et al.*

In the matter of the
CENTRAL RENEWAL PROCEEDING

SUPPLEMENTAL OPINION AND ORDER ON RECONSIDERATION

The Board on July 31, 1953, issued its decision in the above-entitled proceedings. In the *Additional North-South Service to Tulsa Case*[1] (the *"Tulsa Case"*), the Board au-

[1] Order No. E-7597. Prior to such decision a stop was required at Oklahoma City, Okla., on flights between Tulsa and Dallas.

thorized Braniff Airways, Inc., by amendment of its certificate of public convenience and necessity for route No. 9, to provide nonstop service between Tulsa, Okla., and Dallas, Tex. In the *Wichita Falls-Dallas Service Case*[2] (the *"Wichita Falls Case"*) the Board, *inter alia,* denied the application of Continental Air Lines, Inc., for an extension of its route No. 29 from Wichita Falls, Tex., to Dallas and Fort Worth, Tex. In the *Central Renewal Case*[3] (the *"Central Case"*) the Board (a) awarded Central Airlines, Inc., a new local service route segment between the terminal point Oklahoma City, Okla., the intermediate points Chickasha and Lawton-Fort Sill, Okla., and Duncan, Okla., and the terminal point Dallas/Fort Worth, Tex. (to be served through the Amon Carter Air Field); (b) temporarily renewed Continental's authority to serve Lawton-Fort Sill on route No. 29 as an intermediate point between Oklahoma City and Wichita Falls, and (c) dismissed as moot applications of Continental, Trans Texas Airways, and Pioneer Air Lines, Inc., to provide local air service over the segment awarded to Central.

Continental has filed separate petitions for reconsideration in each of the subject proceedings and, in addition, has filed a joint motion seeking other relief in the event that reconsideration is granted. A petition seeking reconsideration of the Board's decisions in the *Central* and *Wichita Falls* Cases has been filed by the City and Chamber of Commerce of Lawton, Okla. The Chamber of Commerce of Roswell, N. Mex., is seeking reconsideration of the Board's decision in the *Wichita Falls Case;* and petitions for reconsideration of the *Central Case* have been filed by the Cities and Chambers of Commerce of Ada and Ardmore, Okla., and the City and Chamber of Commerce of Dallas, Tex. Answers to the petitions have been filed by Central, Braniff, Pioneer, American Airlines, Inc., and the Chamber of Commerce of Fort Worth, Tex.

---

[2] Order No. E-7596.

[3] Order No. E-7595.

The Board, after due consideration of the matters set forth on behalf of the petitioners and the responses thereto made by the opposing parties, finds that there is no reason to depart from its original decisions in the above-entitled proceedings. We shall hereinafter discuss certain of petitioners' contentions in order to make clear the Board's reasons for adhering to its original decisions.

1. With respect to Tulsa-Dallas service, the Board gave concurrent consideration to Continental's application in the *Wichita Falls Case* with that of Braniff in the *Tulsa Case*, and rendered its decisions in these cases simultaneously. Continental contends that the Board is legally required to go further and make comparative findings with respect to these applications. We must reject this contention. It is apparently premised on a belief that the applications here involved are mutually exclusive.[4] We find, however, that such is not the case. Even a casual examination of the Continental proposal reveals that it involves many additional and important one-carrier services which are not seriously affected by the grant of a Tulsa-Dallas nonstop to Braniff. The granting of Braniff's application does not in itself foreclose the granting of Continental's application. In any event, even if mutual exclusivity were present here, comparative findings are not legally required under the circumstances present in this case. For the reasons set forth in our opinion in the *Wichita Falls Case* the Continental application considered in its entirety must be rejected for reasons unrelated to the grant of Braniff's application. In

[4] Continental stresses the fact that decision on Braniff's Tulsa-Dallas nonstop proposal was deferred until consideration of Continental's application in the *Wichita Falls Case*. From this fact Continental concludes that the Board itself considered the two applications to be mutually exclusive. This conclusion is completely unwarranted. In many instances, the Board has, as in this case, deferred applications for contemporaneous decision with other applications because of some interrelationship between the applications involved. However, although one application may be affected by another, it by no means follows that the applications are mutually exclusive.

our view it is superfluous and misleading to compare the advantages and disadvantages of two applications where one, considered solely on its merits under the standards of the Act, must be denied.

Continental has also suggested that it is entitled to a consideration of a partial grant of its application limited to Tulsa-Dallas service, and a comparison of such a proposal with Braniff's in the *Tulsa Case*. It is important to note that Continental did not make any separate and distinct case based on a Tulsa-Fort Worth/Dallas service as distinguished from the grant of its entire application. Indeed, even at this late date, Continental has not come forth with definite suggestions as to how limited its proposal would be, what services would be rendered, and what the anticipated revenues, expenses and diversion might be. In view of these facts, Continental has little standing to complain of inadequate comparative findings in this regard. However, it can be shown that there are strong and persuasive considerations favoring selection of Braniff over Continental to provide additional nonstop Tulsa-Dallas service. In the first place, as between the two, Braniff is already serving the Dallas-Tulsa market (via Oklahoma City), while Continental is not, and, in fact, renders no service to Dallas on any route. Thus it is clear that the authorization of a Dallas-Tulsa nonstop to Continental would not only require the carrier to establish a new station at Dallas, but would also require Continental to operate new schedules between Dallas and Tulsa at substantial additional cost. Braniff, on the other hand, not only has existing stations at both points but, in addition, will actually be in a position to reduce its direct operating costs by reason of the shorter nonstop distance between Dallas and Tulsa. Furthermore, granting Continental the necessary authority to provide Tulsa-Dallas nonstop service on route 29 would inevitably have a more serious diversionary impact on other carriers providing service into Dallas/Fort Worth than would the authorization of Braniff to provide

such service. The Board decision granting Braniff the right to provide nonstop service between Tulsa and Dallas places Braniff in a position of equality in the Tulsa-Dallas market with its principal competitor, American. In contrast, the extension of Continental would subject both American and Braniff to new and serious competitive diversion in markets where a third carrier's competition is not required. These are persuasive reasons for favoring Braniff's application over Continental's.[5]

2. Continental has also urged in its petitions for reconsideration that comparative considerations of its application in the *Wichita Falls Case*, in Docket No. 3094, with Central's in the *Central Case*, in Docket No. 4083 should lead to the conclusion that the public convenience and necessity require an award of a restricted Lawton service to Continental in the *Wichita Falls Case*.[6] However, as we noted with respect to Continental's Tulsa-Dallas contentions, the carrier did not in the presentation of its case in Docket No. 3094 establish a case for the award of a Lawton service apart from the granting of its entire application. And the record in the *Wichita Falls Case* does not contain appropriate expense estimates, or service proposals for a Lawton service independent of the other

[5] Roswell argues that we have overlooked its contentions in support of Continental's application for extension to Dallas/Fort Worth. However, this is not the case. In reaching our decision to deny Continental's application, we considered, among other factors, the public benefits to be derived from new single-plane service to Dallas-Fort Worth from Roswell, Lawton-Fort Sill and certain other cities. It was our conclusion that these public benefits were insufficient to outweigh the disadvantages of Continental's proposal, including the diversion from other carriers and the risk of additional subsidy cost for the new service. See Order No. E-7596, Appendix, pp. 103-105.

[6] It is not clear whether Continental is arguing that it did not receive any comparative consideration of its application in Docket No. 3094, or whether the comparative findings made by the Board (*Central Case, supra*, p. 4) were inadequate. We have proceeded on the latter assumption.

services sought by Continental. Even at this stage of the proceeding, Continental has failed to make clear its position on the service it should be authorized to perform, the equipment it would operate, the estimated costs of the service, and the forecast diversion from other carriers. Under such circumstances, Continental has little standing to complain about any alleged dearth of comparative findings with respect to the service in question.

In any event, there are substantial reasons for selecting Central's proposal in the *Central Case* rather than awarding Continental a restricted Lawton service in the *Wichita Falls Case*. In the first place, Central will satisfactorily accomplish all major public service needs we are seeking to meet including the provision of one-carrier service between Lawton and Dallas/Fort Worth, and, in addition, the needed local air service to Chickasha and Duncan, a service which we could not legally award to Continental in the proceedings before us.[7]

In the Supplementary Opinion in the *Central Case*, when Trans-Texas rather than Central was selected to operate a local service in Arkansas, we recognized Central's "undoubted need for greater traffic and revenue mileage over which to spread its overhead costs" but concluded that "other areas are available for Central."[8] The Lawton segment is one of the most logical opportunities available for strengthening Central's system, because it is located squarely within Central's geographical area, and integrates well with Central's route system. Central already serves Oklahoma City and Dallas/Fort Worth, the two

[7] It has been suggested that we award Continental a Lawton service in the *Wichita Falls Case*, and reopen that proceeding for further hearings on the question of service to Chickasha and Duncan by Continental. However, we do not believe that further postponement of air service to Chickasha and Duncan is in the public interest merely to permit such service by Continental rather than Central. It is to be noted that more than three years have already passed since the original application was filed in the *Central Case*.

[8] Order No. E-7307, decided April 17, 1953, p. 15.

major terminal points to be served—and would be merely operating an additional routing between them. Thus, the new segment provides an excellent opportunity for Central to spread its overhead and station expenses over a broader base, and to reduce its unit cost of operation.

A considerable point has been made of the substantially lower subsidy costs which allegedly would result from selection of Continental. However, as we have already pointed out, suitable estimates have not been advanced by that carrier on the basis of which any satisfactory comparison could be made with the Central figures. Furthermore, there are several important facts that are adverse to Continental's position. Continental is asking for an entry into an entirely new terminal point—Dallas/Fort Worth. Establishing and operating such a station would clearly be expensive for Continental, and with that carrier operating subject to restriction, the resultant limitations on its frequencies would necessarily mean high unit costs for the new operation. While we do not know what equipment Continental would operate, the following conclusions would appear to be warranted. In the first place, there is considerable doubt whether a DC-3 operation over the Lawton segment would integrate well into Continental's present operations. Continental is not presently operating DC-3 equipment into Tulsa, Oklahoma City, Wichita Falls, or Lawton. Thus, additional expense would be required to establish new DC-3 maintenance facilities in the area, or equipment would have to be ferried to some other base where DC-3 maintenance is presently performed. On the other hand, if Convair aircraft are used, they would be considerably more expensive to operate per plane mile than DC-3's, and there is no warrant in the record for forecasting a traffic density on a segment providing a restricted service to Lawton, sufficient to bring down the unit costs.

Moreover, even though awarded a restricted service, it is apparent that certification of Continental would result

in greater diversion of revenues from other carriers. Central's only diversion is from Continental, in the forecast amount of $33,000, whereas the award of a Lawton service to Continental, even with the restrictions suggested in the minority opinion in the *Wichita Falls Case,* would subject Central, as well as American and Braniff, to substantial diversion.

With Dallas/Fort Worth already served by Central and six other carriers, and with American, Braniff and Central already operating service between Oklahoma City and Dallas/Fort Worth, it is inconsistent with the establishment of a sound route pattern to extend Continental to Dallas/Fort Worth for the alleged purpose of serving Lawton. Were Continental certificated, both Continental and Central would be operating local services between Oklahoma City and Dallas/Fort Worth via different routings. Each would have limited frequencies and neither would be in a position to develop enough volume to provide a satisfactory service pattern.

Many of Continental's difficulties in these proceedings stem from the carrier's failure to adjust the prosecution of its proposals to the proceedings established by the Board. Since the Wichita Falls-Dallas application of Continental in Docket No. 3094 embraced, *inter alia,* Tulsa-Dallas/Fort Worth and Lawton-Dallas/Fort Worth services, Continental sought consolidation of these portions of its application into the *Tulsa Case* and the *Central Case,* respectively. When the Board for sound reasons refused such consolidations, this did not in any way prevent Continental from prosecuting its more limited proposals re Tulsa-Dallas/Fort Worth and Lawton-Dallas/Fort Worth service in the *Wichita Falls-Dallas Proceeding.* Notwithstanding this fact, Continental did not prepare and present to the Board the customary evidence in support of each limited proposal, i.e., proposed schedules and equipment, estimated revenues and expenses, and probable effect on other carriers. All the carrier submitted in the

way of evidentiary support were plans, proposals and estimates that supported the application as a whole. Thus, to the extent that the record in the *Wichita Falls Case* is weak in evidentiary support for Continental's more limited proposals, it is the consequence of the carrier's own doing and not in any sense attributable to the Board. Notwithstanding the carrier's apathy in supporting its limited proposals by presentation of evidence, the Board has given full recognition to such proposals and has afforded them full consideration on the basis of evidence of record in the *Wichita Falls Case*. And in this order we have made comparative findings in relation to the proposals of Braniff in the *Tulsa Case* and the proposals of Central in the *Central Case* (in each of which proceeding Continental participated as a party).[9] All in all, we concluded that Continental has been afforded all that can be required as a matter of law or in the exercise of sound discretion.

3. In the *Central Renewal Case*, we decided that Continental's application in Docket No. 4975 for a local service between Oklahoma City and Dallas/Fort Worth via Chickasha, Lawton-Fort Sill, Duncan and Denton (hereinafter called the Lawton segment) was contingent upon nonrenewal of Central's authority to provide service over route No. 81. Since Central's authority was renewed, we dismissed Continental's application as moot. Continental denies that its application was contingent and urges that its application should be treated as competitive with Central's application.

---

[9] Although we have under points 1 and 2 above compared, to the extent the record would appear to enable us to do so, the limited proposals of Continental with Braniff's and Central's, we thought it desirable to do so because the limited proposals are vigorously pressed as a desirable alternative by both Continental and, in the case of the Lawton service, by the minority. By so doing, we do not concede that through an extension of the Ashbacker doctrine we are legally required to make comparative findings with respect to a segment or portion of an application in the circumstances present here.

In view of Continental's arguments, we have carefully reexamined the record in the proceeding to explore the theory under which it prosecuted its application.[10] There is some support in the record for a conclusion that Continental's own attitude towards such application was ambivalent. However, it is clear that Continental's participation in the *Central Case* was not such as to fairly place the other parties therein on notice of its intention to be considered a competitive applicant with Central for an Oklahoma City-Dallas/Fort Worth local service segment.

Continental's application, although unqualified on its face, was expressly described as contingent in the contemporaneously filed motion to consolidate that application for hearing in the *Central Case*.[11]

The order in which consolidation was granted specifically refers to the contingent nature of the application. The order describes Continental's application as one to "provide service over the *route proposed by Central* * * * in the event the Board decides that service is required but Central's certificate should not be renewed."[12] (Emphasis added.) Continental was served with a copy of this order and entered no objection to this description of its application.

---

[10] Both Central and American in their answers to Continental's petition take issue with Continental and support the Board's determination as to the contingent nature of Continental's application.

[11] Continental's application in Docket No. 4975 is a point to point duplication for local air service west of Dallas, of Central's earlier filed amended application for renewal and modification of its authority over route No. 81. (Comparable applications were filed by Trans-Texas and Pioneer and consolidated for hearing in the proceeding). In a letter sent to the Board requesting reconsideration of the Board's order denying consolidation into the Central proceeding of Continental's application in Docket No. 3094, Continental described its application in Docket No. 4975 as one "to serve Central's proposed route", and stated further that its application "has been filed for the purpose of providing the service only if the Board decided that Central should not be selected to operate its present or proposed route."

[12] Order No. E-5577, dated August 7, 1951, p. 2.

Examination of the exhibits in the proceeding, as well as the transcript of the hearing indicates that the parties did not regard Continental as a competitive applicant for an Oklahoma City-Dallas local service, so long as Central's authority as a local service carrier was renewed. And this was true despite the fact that Continental consistently opposed authorization of Central to provide service to Lawton-Fort Sill. Continental's exhibits did not present separately, data for the Lawton segment, but presented as a whole data with respect to Central's routes (including Central's Lawton segment proposal) which Continental sought to operate if Central were not renewed. Nor did Continental in its oral testimony present additional evidence supporting a competitive application for the local air service in question. Thus, at no time prior to the close of the evidentiary hearing were the parties placed on notice that Continental was prosecuting an application for a new local service in the area served by Central, whether or not Central continued to serve that territory as a certificated carrier.

None of the briefs to the Examiner, except Continental's, gives any indication that the parties regarded Continental as an applicant competitive with Central for a local service between Oklahoma City and Dallas/Fort Worth. And while Continental's brief may be interpreted as a prosecution of a competitive application, the Examiner apparently either overlooked or ignored such interpretation in view of Continental's other firm indications of position in the proceeding.

In describing the scope of the proceeding in his initial decision, the Examiner refers to Continental, along with Trans-Texas and Pioneer as having "applied for routes within the geographic limits of Central's operations only in the event the Board should find that air service in the area is required by the public convenience and necessity but that Central is not fit, willing and able to provide such service." Although Continental had an opportunity by excep-

tions to set the record straight, it did not do so. Instead, it filed a letter with the Board expressing unqualified agreement with "those portions of the Examiner's decision of major importance to Continental." The letter gives further unmistakable evidence that Continental recognized that its application for the Lawton segment was extinguished by the extension of Central's authority. Continental describes the Examiner's decision as deferring "Central's application for service between Lawton-Fort Sill and Dallas-Fort Worth * * * pending decision on Continental's Lawton-Dallas application," although the Examiner merely stated that "any conclusion with respect to the matter of service between Lawton-Fort Sill and Dallas * * * should be deferred pending decision on Continental's application" in the *Wichita Falls Case.*

While Continental has pointed to other portions of the record which, if viewed in a different context, would support its contention, we are convinced that a fair appraisal of the entire record, taking into account the matters above referred to, requires the conclusion that Continental had at no appropriate time in the *Central Case* given adequate notice that it was prosecuting an application for a local service between Oklahoma City and Dallas/Fort Worth competitive with Central's.

4. Continental has urged that our decision in the *Wichita Falls Case* must be deferred to permit contemporaneous consideration and comparative findings with regard to Continental's application in the *Wichita Falls Case,* and the applications of Pioneer in (a) the deferred portion of the *Texas Local Service Case* relating to service between Roswell and Dallas, and (b) in the *Pioneer Renewal Case* involving the Lubbock-Albuquerque segment of Pioneer's route. This contention is clearly without merit, since Continental's application is being acted on *first.* Obviously the denial of all or part of Continental's application is not precluded merely by the existence of other pending or partially

processed applications.[11] Moreover, we must point out that insofar as Continental's petition may be requesting a partial grant of its application we have not been presented with definite service proposals consistent with such limited grant of its application, or appropriate expense and diversion forecasts. In view of these considerations, we find that Continental has failed to support adequately its proposal for the limited grant of its application.

5. We turn now to the request for reconsideration of our decision in the *Central Case* to provide service to Dallas/Fort Worth on the Lawton segment through Amon Carter Air Field. In reaching this decision we considered, among other matters, the fact that the subsidy cost to the Government would increase substantially if the new service to Fort Worth and Dallas were provided through separate airports. We noted that Central's application was in terms broad enough to permit a designation of service to Dallas and Fort Worth as a single rather than separate points. The record indicated that Central was providing service to Dallas and Fort Worth through separate airports, and that, on completion of Amon Carter Air Field, it intended to provide service thereto. By the time of our decision, Central was providing service to Dallas and Fort Worth through three separate airports. The record also indicated that the facilities available at Amon Carter and its location and convenience were such as to provide adequately, on our opinion, for local service to both Dallas and Forth Worth. It was with these facts in mind that we specified Amon Carter as the place through which Dallas and Fort Worth were to be served. Although in authorizing new certificated service we usually name a city rather than one of the air-

[11] As a matter of fact, Continental's position here is inconsistent with its earlier position taken in the *Pioneer Renewal Case*, where it stated that it had no objection to the renewal of Pioneer's Lubbock-Albuquerque segment. It has given no reason as to why it should not now, after the close of hearing in that proceeding, be held to that position.

ports serving that city, our power under section 401(d) of the Act to authorize the whole or any part of the transportation covered by the application permits, where appropriate, the course followed here. Our action in this regard is no different from that which we have taken in many other cases over the years since adoption of the Act, without challenge from any party. In our view our action was taken with adequate notice to all parties. Furthermore, the designation of Amon Carter Air Field constitutes a description of the transportation authorized by the certificate, and is not a prescription of a "facility" in contravention of the limitations on our power set forth in section 401(f) of the Act.[11]

We have considered the other grounds advanced by petitioners for reconsideration and other relief, and find them without merit.

THEREFORE, IT IS ORDERED:

1. That except to the extent that we have supplemented our findings, the petitions for reconsideration and/or other relief be, and they hereby are denied.

2. That Continental's motion for consolidation, for oral argument, and other relief be, and it hereby is, denied.

Lee, Adams and Gurney, Members of the Board, concurred in the above opinion and order. Ryan, Chairman, and Denny, Vice Chairman, filed the attached joint dissenting opinion.

/s/ M. C. Mulligan
M. C. Mulligan
Secretary

(SEAL)

---

[11] Section 401(f) provides in pertinent part, as follows:

"No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation. * * *"

RYAN, CHAIRMAN, AND DENNY, VICE CHAIRMAN, DISSENTING:

We disagree with the majority's refusal to reconsider its decision in Docket No. 4083, *et al.*, the *Central Renewal Case*, and in Docket No. 3094, *et al.*, the *Witchita Falls-Dallas Service Case*, for reasons set forth in our dissents accompanying the opinions of July 31, 1953. The petitions for reconsideration, and answers thereto, affirm our prior observation that the award of this segment to Central rather than to Continental will require unnecessary expenditures of Federal subsidy of approximately $300,000 per year.

At the time of the July 31 opinions the parties had not briefed the point on which the majority there held in the *Central Renewal Case* that Continental could not be considered an applicant for an Oklahoma City-Chickasha-Lawton/Fort Sill-Duncan-Dallas/Fort Worth route segment. The critical finding, reached therein for the first time, was that Continental's application for this segment was contingent upon the Board's failure to renew Central's authority to serve Route No. 81. That question has now been reviewed in detail in the petitions for reconsideration and we are convinced in the light of the entire record relating to this matter that Continental's application for this particular segment was not contingent upon our renewal of the prior existing Route No. 81, which included no such segment.

The basic and obvious purpose of Continental's point to point duplication of Central's application for the segment here concerned in the Central Case was to protect its application in the Witchita Falls Case and insure against foreclosure of the latter because of the additional intermediate point proposals contained in the form. To hold that such application is contingent would clearly defeat its very purpose.

Central's brief to the Board in the Central Case was devoted in large part to the question of renewal, with certain modifications, of its existing Route No. 81. A separate

portion of its brief was devoted to the new segment sought under the heading "The Oklahoma-Dallas Segment via Chickasha, Lawton-Fort Sill and Duncan is Required and *Should* be Awarded to Central" (italics supplied). Again, at the oral argument in the Wichita Falls Case, which occurred after the Board's decison renewing Central's Route No. 81 as a partial decision of the Central Case, counsel for Central did not once suggest that other applicants for this segment were barred, but devoted his argument to comparative reasons why Central should be selected to serve this segment. We cannot reconcile such statements with the majority's finding that Central was without notice that there were competitive applicants for the local route between Oklahoma City and Dallas-Fort Worth.

We would accordingly grant reconsideration and give full comparative consideration to the competitive applications for this route segment.

/s/ Oswald Ryan
/s/ Harmar D. Denny

APPENDIX C

I.

Section 401(c) of the Civil Aeronautics Act of 1938, as amended [52 Stat. 987, 49 U.S.C. 481]:

"(c) Upon the filing of any such application, the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Board shall dispose of such application as speedily as possible."

II.

Administrative Procedure Act of 1946:

Section 5(a) [60 Stat. 239, 5 U.S.C. § 1004] "NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the *matters of fact* and law *asserted.* In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives." [Italics added.]

Section 10(e) [60 Stat. 243, 5 U.S.C., § 1009] "SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise

not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) *without observance of procedure required by law;* (5) *unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute;* or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." [Italics added.]

III.

Section 202.3 of the Economic Regulations of the Civil Aeronautics Board (issued March 19, 1943, recodified July 1, 1949, 14 F.R. 3522):

"(a) *Airport notice.* If the holder of a certificate desires to serve regularly a point named in such certificate through the use of any airport not then regularly used by such holder, such holder shall file with the Board written notice of its intention so to do. Such notice shall be filed at least 30 days prior to inaugurating the use of such airport. Such notice shall be conspicuously entitled Airport Notice, shall clearly describe such airport and its location, and shall state the reasons the holder deems the use of such airport to be desirable. The use of such airport may be inaugurated 30 days after the filing of such notice, unless the Board notifies the holder within said 30-day period that it appears to the Board that such use may adversely affect the public interest, in which event such use shall not thereafter be inaugurated (except as may be expressly permitted by such notification) unless and until the Board finds, upon application filed by the holder, that the public interest would not be adversely affected by such use. The Board may permit the use of an airport at any time after the filing of the Airport Notice whenever the circumstances warrant such action. In no event shall the holder use the provisions of this

paragraph as authority to receive passengers at one airport and discharge such passengers at any other airport serving the same point.

"(b) *Service of notice.* A copy of each Airport Notice shall be served upon such persons as the Board may designate in a particular case, and shall be served upon the following persons in all cases:

"(1) The Postmaster General, marked for the attention of the Second Assistant Postmaster General;

"(2) Each scheduled air carrier which regularly renders service to or from the point intended to be served through the proposed airport;

"(3) The chief executives of the city (or other political subdivision) and of the State, in which are located the currently used airport, the proposed airport, and the point to be served, respectively. (If there be a state commission or agency having jurisdiction of transportation by air, notice shall be served on such commission or agency rather than on the chief executive of the State.)"

INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes and regulations involved	2
Statement	2
Argument	5
Conclusion	11
Appendix A	12
Appendix B	16

CITATIONS

Cases:

Civil Aeronautics Board v. *State Airlines*, 338 U.S. 572 ..... 4, 5, 8, 9

Statutes:

Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U.S.C. 401 *et seq.*:

Section 401(a)	12
Section 401(b)	12
Section 401(c)	12
Section 401(d)	13
Section 401(f)	14
Section 401(h)	15

Regulations:

Civil Aeronautics Board Regulations, 14 C.F.R. 202 *et seq.*:

Section 202.1	16
Section 202.3	16

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 440

THE CITY OF DALLAS and DALLAS CHAMBER OF COMMERCE, PETITIONERS

v.

CIVIL AERONAUTICS BOARD, CENTRAL AIRLINES, INC., THE CITY OF FORT WORTH, TEXAS, and FORT WORTH CHAMBER OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A) is not yet reported. The orders and findings of the Civil Aeronautics Board (Pet. App. B) are not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the court of appeals correctly held that, on the facts of this case, petitioners had adequate notice that the Civil Aeronautics Board might specify, in connection with the certification of Dallas-Fort Worth, Texas as a single point for airline service, that the point should be served through the Amon Carter Air Field.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Civil Aeronautics Act and the regulations of the Civil Aeronautics Board are set forth as appendices, *infra*, pp. 12 to 18.

STATEMENT

Central Airlines Inc., is a local or "feeder" airline which operates in the southwestern United States. It is authorized, by its certificate of public convenience and necessity, to serve both Dallas and Fort Worth on various of its route segments (R. 224). Central applied to the Board for authorization for a new route segment extending between Oklahoma City and Fort Worth, via five intermediate points, including Dallas (R. 1-4).

After full administrative proceedings, in which petitioner Dallas Chamber of Commerce intervened, the Board issued to Central a temporary certificate of public convenience and necessity for three years covering the new segment. In such certificate, the Board designated the southern

terminal point as "Dallas-Fort Worth, Tex. (to be served through the Amon Carter Air Field)." (R. 250, 251.) Amon Carter Field, which is owned and operated by the city of Fort Worth, is located approximately midway between Dallas and Fort Worth, and is approximately 17 to 18 miles northwest of the center of Dallas. The city of Dallas owns and operates its own airport, Love Field, which is 11 miles from Amon Carter field, and seven miles from the center of Dallas. (R. 110, 298.)

Petitioners sought (R. 259-269), but the Board denied, reconsideration of its order. The Board held that sections 401(d) and 401(f) of the Civil Aeronautics Act authorized it to certificate both cities as a single point to be served through Amon Carter field, and that such action had been taken "with adequate notice to all parties." The Board stated that the facilities, location, and convenience of Amon Carter field would provide adequate local service to both Dallas and Fort Worth, and that subsidy costs to the Government would substantially increase if the new service to Fort Worth and Dallas were provided through separate airports. (R. 274, 287-288, Pet. App. B 18, 30-31.)

The court of appeals affirmed the Board's order. The court held—and no review is sought here of that holding—that the Board had statutory authority to provide, in the certification proceedings, that the single point Dallas-Fort Worth should be served through Amon Carter field. The court further held that petitioners had adequate notice that the issue of service through Amon Carter field was before the Board.

The court noted that, although the issue of service through Amon Carter had not been specifically raised by Central's application or at the pre-hearing conference, there had been adequate notice within the principles of *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572. The court interpreted the *State* case as holding that, in certification proceedings where the prime consideration is the public interest in establishing a sound transportation pattern, the "requirements of notice are satisfied when interested parties are sufficiently informed of the issues so that they may present evidence which will enable the Board to reach its decision on the basis 'of all available information'." (Pet. App. A 6, 7-8).

The court pointed out (Pet. App. A 8) that, as in the *State* case, petitioners had notice of the certification proceedings and participated therein; that petitioners knew that Amon Carter field was under construction, since they had attempted to block it; that they should have been aware that the Board might designate Dallas-Fort Worth as a single point to be served through Amon Carter field, since they had participated in prior Board hearings in which two cities had been certificated as a single point and a designated airport provided; and that officials of Central had been questioned at the hearing regarding Central's plans to use Amon Carter. These factors, the court concluded, must be deemed to have "sufficiently alerted" petitioners to the possibility that service might be certificated to Dallas-Fort Worth through Amon Carter field.

The court further held that, under the *State Airlines* case, the Board was justified in refusing to reopen the proceedings, since the petition for reconsideration did not indicate specifically the nature of the evidence which petitioners proposed to submit. The court also rejected petitioners' contention that there was insufficient evidence to support the Board's findings that Amon Carter field would adequately serve Dallas, and that service to Dallas and Fort Worth through separate airports would substantially increase subsidy costs.[1]

---

1. Petitioners concededly (Pet. 9, 10) have abandoned their principal contention in the court of appeals, namely, that in certification proceedings the Board cannot designate the airport through which a particular community is to be served. They seek review only of the court's holding that they had adequate notice that service to Dallas-Fort Worth might be rendered through Amon Carter field. Although petitioners urge (Pet. 10) that the latter holding overcomes a broad principle of general significance, the decision below actually turns upon the facts of this particular case and, in the light of its limited applicability, its correctness presents no question of sufficient general import.

---

[1] Judge Prettyman, dissenting on the entire case, was of the view that, absent specific notice that the Board was proposing to specify the airport in the certificate, petitioners were entitled to rely on the assumption that the Board's "established" airport designation procedure would be followed and to assume that the airport issue would be decided in a separate proceeding. Pet. App. 30a-31a. But, see *infra*, pp. 10-11.

ance in the administration of the Civil Aeronautics Act to warrant further review by this Court.

Contrary to petitioners' contention (Pet. 12), the court of appeals did not lay down any general rule that notice of a route certification proceeding is itself sufficient to authorize the Board to designate the airport through which the service is to be rendered. On the contrary, the court rested its conclusion that there was a fair hearing on the particular facts of this case. The court noted that petitioners had fully participated in the instant proceedings, that they were familiar with the construction of Amon Carter field, that they had participated in other Board proceedings in which the certificate had specified that particular points should be served through designated airports, and that Central officials had testified extensively at the hearing as to their plans for using Amon Carter field upon its completion. The court held that, in these circumstances, petitioners had been "sufficiently alerted * * * to the possibility that service might be certificated to Dallas-Fort Worth through Amon Carter" to bring them within the rule of *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572, namely, that notice in certification proceedings is adequate "when interested parties are sufficiently informed of the issues so that they may present evidence which will enable the Board to reach its decision on the basis 'of all available information'." (Pet. App. A 7.)

Although petitioners present this case as one in which the Board certificated Central to serve Dallas as a separate point through Amon Carter in-

stead of through Love Field, Dallas's own airport (see question presented, Pet. 2; Pet. 15), the fact is that the Board certificated Dallas and Fort Worth jointly as a single point to be served through an airport located approximately midway between them. Thus, even if the decision below has significance beyond the instant case, its practical effect is largely limited to the small number of instances where, because of considerations of public convenience and necessity, the Board may find it in the public interest to require service through a designated airport. As the past history of Board certifications clearly demonstrates, it is only in unusual and infrequent situations[3] that the Board finds it necessary to designate, for reasons of public convenience and necessity, a single airport in the certificate.

Finally, it should be noted that the portion of the decision below of which review is sought has only a slight impact upon petitioners themselves. This case involves only a temporary certificate of a single carrier, which, by its terms, will expire in February 1956. Only five of the carrier's twelve daily flights into the Dallas-Fort Worth area are restricted to Amon Carter. Moreover, as petitioners indicate (Pet. 13, 14), they are participating in four other Board proceedings dealing with certification of other local-service carriers into the

---

[3] Since 1938 there have been only 30 such instances out of the thousands of points which the Board has certificated. In the present case the need to reduce subsidy requirements—a proper factor in certification proceedings—necessitated the designation of Amon Carter field.

Dallas-Fort Worth area, and they are now fully on notice of the extent to which service through Amon Carter is an issue in those cases.

2. Contrary to petitioners' contention (Pet. 9-12), the decision below is not in conflict with *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572, but correctly applies the rule of that decision to the facts of the instant case.

In the *State Airlines* case, the Board heard and decided, in a single consolidated proceeding, 45 route applications filed by 25 carriers covering the same area. The Board issued a certificate to Piedmont Aviation, Inc., for routes "differ[ing] markedly" (p. 577) from those for which it had applied. State Airlines, an unsuccessful applicant, challenged the Board's order on the ground, *inter alia*, that since Piedmont had not applied for the particular routes which it received, State had no notice that Piedmont was an applicant for such routes, and State therefore failed to produce available evidence that Piedmont was not qualified to serve the routes.

This Court held that State had not been denied a fair hearing. Noting that the "prime purpose" of allowing interested persons to offer evidence "is to give the Board the advantage of all available information as a basis for its selection of the applicant best qualified to serve the public interest" (p. 578), the Court found that the Board had "fully appreciated its responsibility in this respect" (p. 579). The Court stated *(ibid.)* that it was "plain * * * from the entire record" that State "fully recognize[d] that Piedmont was a potential competitive

applicant in the consolidated proceedings;" and that State, although given an opportunity on rehearing to show that the proceeding should be reopened to permit it to introduce the additional evidence as to Piedmont's lack of qualification which it allegedly had been precluded from presenting, had failed to specify the nature of the proposed evidence.

We submit that the court of appeals was correct in interpreting *State Airlines* as holding that the adequacy of notice in a route certification case depends upon whether, in the light of all the facts, "interested parties are sufficiently informed of the issues so that they may present evidence which will enable the Board to reach its decision on the basis 'of all available information.'" And, under that standard, petitioners plainly have not been denied a fair hearing. For, as the court of appeals noted, the facts in this case must be deemed to have "sufficiently alerted" petitioners to the possibility that Dallas-Fort Worth service might be provided through Amon Carter field (see Statement, *supra*, p. 4). Moreover, as in *State Airlines*, when petitioners here were given an opportunity to show what new evidence they proposed to submit on rehearing, they failed to specify the nature of such evidence. The factual distinctions which petitioners draw between the instant case and *State Airlines* (Pet. 10-11) are not material, since *State Airlines* makes the adequacy of notice a factual question to be determined in the light of the facts in each particular case.

3. Petitioners' contention (Pet. 13-15) that the Board departed from its "established policy" (Pet. 5) of leaving the initial decision on airport selection to airline management, and Judge Prettyman's view, in his dissenting opinion, that petitioners "had a right to rely upon the established procedure in respect to the designation of the airport to be used" (Pet. App. A 12), both rest upon a misconception of the Board's settled practice with respect to airport designation. The Board's "established procedure" is that, in the usual case where the Board certificates a carrier to serve a particular city as the designated point, but finds it unnecessary to designate the airport through which such service is to be provided, the carrier itself then selects the airport and files a notice thereof with the Board (see Appendix B, *infra*, pp. 16-18). In those cases, the selection of the airport, which is normally accomplished without hearing, does not affect and is unrelated to the Board's prior determination of the requirements of the public convenience and necessity.

In the instant case, however, the airport designation was an integral part of the route certification itself. Unlike the usual case, here the Board did not merely certificate a particular city, but found it necessary, because of subsidy and other considerations, to certificate Dallas-Fort Worth as a single point to be served through a particular airport.[8] In other words, the airport designation in

[8] Petitioners challenge (Pet. 15) the evidentiary basis for this conclusion. The same contention was fully considered and re-

this case was a part of the route which Central received. In such a situation, the Board's airport notice procedure is inapplicable.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and the petition presents no question of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Special Assistant to the Attorney General.
EMORY T. NUNNELEY, JR.,
General Counsel,
JOHN H. WANNER,
Associate General Counsel,
JAMES L. HIGHSAW, JR.,
Chief, Litigation and Research Division,
O. D. OZMENT,
Attorney, Civil Aeronautics Board.

DECEMBER, 1954

---

jected by the court of appeals (Pet. App. A 9-10), and it obviously presents no question of general importance.

APPENDIX A

The relevant provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended (49 U.S.C. 401, *et seq.*), are:

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Certificate Required

Sec. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation:

* * * * *

Application for Certificate

(b) Application for a certificate shall be made in writing to the Authority [Board] and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Authority [Board] shall by regulation require.

Notice of Application

(c) Upon the filing of any such application, the Authority [Board] shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Authority [Board] and to such other persons as the Authority [Board] may by reg-

ulation determine. Any interested person may file with the Authority [Board] a protest or memorandum of opposition to or in support of the issuance of a certificate. Such application shall be set for public hearing, and the Authority [Board] shall dispose of such application as speedily as possible.

Issuance of Certificate

(d) (1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority [Board] may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder.

* * * * *

Terms and Conditions of Certificate

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Authority [Board] shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency

at a point not named in its certificate or by operating in an emergency, under regulations which may be prescribed by the Authority [Board], between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority [Board].

* * * * *

Authority to Modify, Suspend, or Revoke

(h) The Authority [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate.

* * * * *

APPENDIX B

The relevant provisions of the regulations of the Civil Aeronautics Board (14 C. F. R. 202) are:

PART 202—TERMS, CONDITIONS AND LIMITATIONS OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY; INTERSTATE AND OVERSEAS AIR TRANSPORTATION.

* * * * *

§ 202.1 *Applicability.* Unless a certificate or the order authorizing the issuance of such certificate shall otherwise provide, there shall be attached to the exercise of the privileges granted by each certificate authorizing an air carrier to engage in interstate or overseas air transportation pursuant to section 401 of the act such terms, conditions and limitations as are set forth in this part, and as may from time to time be prescribed by the Board.

* * * * *

§ 202.3 *Airport authorization*—(a) *Airport notice.* If the holder of a certificate desires to serve regularly a point named in such certificate through the use of any airport not then regularly used by such holder, such holder shall file with the Board written notice of its intention so to do. Such notice shall be filed at least 30 days prior to inaugurating the use of such airport. Such notice shall be conspicuously entitled Airport Notice, shall clearly de-

scribe such airport and its location, and shall state the reasons the holder deems the use of such airport to be desirable. The use of such airport may be inaugurated 30 days after the filing of such notice, unless the Board notifies the holder within said 30-day period that it appears to the Board that such use may adversely affect the public interest, in which event such use shall not thereafter be inaugurated (except as may be expressly permitted by such notification) unless and until the Board finds, upon application filed by the holder, that the public interest would not be adversely affected by such use. The Board may permit the use of an airport at any time after the filing of the Airport Notice whenever the circumstances warrant such action. In no event shall the holder use the provisions of this paragraph as authority to receive passengers at one airport and discharge such passengers at any other airport serving the same point.

(b) *Service of notice.* A copy of each Airport Notice shall be served upon such persons as the Board may designate in a particular case, and shall be served upon the following persons in all cases:

(1) The Postmaster General, marked for the attention of the Second Assistant Postmaster General;

(2) Each scheduled air carrier which regularly renders service to or from the point in-

desired to be served through the proposed airport;

(3) The chief executives of the city (or other political subdivision) and of the State, in which are located the currently used airport, the proposed airport, and the point to be served, respectively. (If there be a state commission or agency having jurisdiction of transportation by air, notice shall be served on such commission or agency rather than on the chief executive of the State.)

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes and Regulations Involved	2
Statement	2
Argument	7
Conclusion	10
Appendix A—Statutes and Regulations	11

CITATIONS

Cases:

Civil Aeronautics Board v. *State Airlines*, 338 U.S. 572 (1950) 5, 7, 8

Statutes and Regulations:

Civil Aeronautics Act of 1938, as amended:
Sec. 401(d) [52 Stat. 987, 49 U.S.C., § 481(d)] 1, 4
Sec. 401(f) [52 Stat. 987, 49 U.S.C., § 481(f)] 1, 4

Economic Regulations of the Civil Aeronautics Board, Sec. 292.3 [14 C.F.R. 720] 1, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 440

THE CITY OF DALLAS AND DALLAS CHAMBER OF COMMERCE,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

CENTRAL AIRLINES, INC., THE CITY OF FORT WORTH, TEXAS, AND FORT WORTH CHAMBER OF COMMERCE, *Intervenors.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE CITY OF FORT WORTH, TEXAS AND FORT WORTH CHAMBER OF COMMERCE IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit and the dissenting opinion (Petition, Appendix A) are not yet reported. The orders,

opinion and findings of the Civil Aeronautics Board (Petition, Appendix B) are not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the Court of Appeals correctly held that the Civil Aeronautics Board's authorization of Central Airlines, Inc., to provide local air transportation service for both Fort Worth and Dallas by certification of the single terminal point "Dallas/Fort Worth, Texas (to be served through the Amon Carter Air Field)" deprived petitioners of adequate notice.

STATUTES AND REGULATIONS INVOLVED

The provisions of the Civil Aeronautics Act (52 Stat. 987, 49 U.S.C. 481 (d) and (f)) and the regulation (14 C.F.R. 738) pertinent to this brief are set forth in Appendix A, *infra*.

STATEMENT

Fort Worth and Dallas are located some thirty miles apart in the north central portion of Texas (R. 272-273). At the time the Civil Aeronautics Board ("Board") issued the order which was upheld by the Court below and which is the subject of the instant petition for certiorari, Fort Worth had completed construction of and placed in operation a new airport, Amon Carter Air Field,[1] representing a total expenditure in excess of $11,000,000. This Class 5 airport—the newest, largest and best-equipped in the area—is the airport most centrally located to both Fort Worth and Dallas (R. 272, 292-293, 298, 304-306), being some

[1] Amon Carter Air Field is also referred to as the "Greater Ft. Worth International Airport" and the "Midway Airport." (R. 109, 307).

eighteen miles west of Dallas and some eighteen miles east of Fort Worth (R. 272, 273, 298). It is readily accessible to both cities by good highways (R. 272, 273, 306, 307) and airport limousine service is available between Amon Carter Air Field and downtown Dallas and Fort Worth (R. 270, 298).

There are two other airports in the Dallas/Fort Worth area which are used by air carriers certificated by the Board to provide scheduled air transportation. One of these is Love Field located approximately seven miles northwest of Dallas and some thirty-one miles northeast of Fort Worth (R. 273, 298). Love Field is the municipal airport of the city of Dallas. The third field is Meacham Field located approximately five and one-half miles from downtown Fort Worth and some twenty-eight miles from Dallas (R. 273, 303).

Central Airlines, Inc. ("Central") holds one of some fourteen experimental certificates of public convenience and necessity issued by the Board to determine by actual experience the feasibility of providing local, short-haul air transportation. The local carriers serve additional, smaller communities not on routes of the so-called trunkline carriers which provide relatively long-haul service. In 1951 Central filed an application with the Board which resulted in the Board's order upheld by the Court below. In this application Central requested, among other things, authority to serve Fort Worth and Dallas on a new segment between the terminal points Fort Worth and Oklahoma City, Oklahoma, via the intermediate points of Dallas and Denton, Texas, and Duncan, Lawton-Fort Sill and Chickasha, Oklahoma (R. 1-4).

In its application Central included the following:

> "Applicant further expressly makes a part of this application a request for such other route and routes serving the general area that the Board may conclude the public convenience and necessity may require, and applicant expressly makes a part of this application a request to engage in the air transportation for which

application is herein made subject to whatever conditions, limitations and/or restrictions the Board may find to be required by the public convenience and necessity, including those presently contained in its certificate or any modifications thereof found by the Board to be required in the public interest." (R. 3)

The prayer of Central's application requested that the Board "grant such other, further and different authority and relief as to it may seem just and proper" (R. 3).

Pursuant to authority conferred upon it by Section 401 (d) and (f) of the Civil Aeronautics Act (Appendix A, *infra*, pp. 11, 12) the Board determined that the public convenience and necessity required service by Central over its new segment for both Dallas and Fort Worth through the single point "Amon Carter Air Field" and so specified in the certificate issued Central (R. 3).

In a "Supplemental Opinion and Order on Reconsideration" the Board denied Dallas' petition for reconsideration, finding among other things that the subsidy cost to the Government of supporting Central's experimental, local routes would be increased substantially if the new service to Fort Worth and Dallas were provided through two separate airports; that the facilities at Amon Carter, its location and convenience were such as to provide adequately for local service for both Dallas and Fort Worth; and that the designation of Amon Carter Air Field was made with adequate notice to all parties (Petition, Appendix B, p. 18).

Petitioners then appealed to the United States Court of Appeals for the District of Columbia Circuit on three grounds: (1) that the Board was without statutory authority to require Dallas-Fort Worth to be served through Amon Carter Air Field (Petition, Appendix A, p. 3); (2) that petitioners did not have adequate notice that the issue of service for "Dallas/Fort Worth" through Amon Carter Air Field was before the Board (Petition, Appendix A, p. 6); and (3) that the Board's order was not sup-

ported by substantial evidence (Petition, Appendix A, p. 9).[2]

The Court of Appeals entered its judgment holding adversely to the petitioners on each of their three contentions, with one Judge dissenting on the issue of adequate notice (Petition, Appendix A, p. 1). The petitioners' request for rehearing was denied by the same Court without opinion.

In finding that there had been adequate notice, the Court below relied upon this Court's decision in *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572 (1950), including this Court's conclusion (as summarized by the Court of Appeals, Petition, Appendix A, p. 7):

> "that the requirements of notice are satisfied when interested parties are sufficiently informed of the issues so that they may present evidence which will enable the Board to reach its decision on the basis 'of all available information'."

The Court of Appeals then compared the facts in the instant case with those in the *State* case, *supra*, and stated:

> "In the present case, petitioners likewise had notice of the certificate proceedings and participated therein. They knew, of course, that Amon Carter Field was under construction.[15] They should have been aware, from past experiences in Board proceedings, that Dallas-Fort Worth might be designated as a single point,[16] and that service to Dallas-Fort Worth through Amon Carter might be required by the certificate.[17] Moreover, at the hearing, itself, officials of Central were questioned at length as to the location of Amon Carter, its stage of completion, and Central's plans regarding service to it when completed. This obvious interest of

[2] Petitioners in their petition for certiorari have abandoned their claims that the Board is without statutory power to require that an applicant serve two contiguous cities through a single, centrally-located airport and that there was no substantial evidence to support the Board's conclusion that the public convenience and necessity require the service by Central here involved through Amon Carter Air Field.

the Board in Amon Carter, coupled with its known practice of prescribing service to points through particular airports, must be deemed to have sufficiently alerted petitioners to the possibility that service might be certificated to Dallas-Fort Worth through Amon Carter."

"[16] The City of Dallas sought unsuccessfully to block the construction of Amon Carter Field in proceedings before the Administrator of Civil Aeronautics. In the Matter of the Hearing of the Petition of the City of Dallas, Texas, Protesting the Location of the North Texas Airport (1943). See City of Dallas v. Bentsel, 178 F. 2d 128 (5th Cir. 1949).

[16] Dallas-Fort Worth had been designated a single point in other proceedings before the Board: American Airlines, Inc.—Temporary Certificate of Public Convenience and Necessity, 3 C.A.B. 415, 418 (1942); Latin American Air Service Case, 6 C.A.B. 857, 921, 925 (1946); and Braniff Airways, Inc., Route No. 15 Restriction, 6 C.A.B. 515, 520 (1945).

[17] Petitioners had previously participated in proceedings in which the Board had specified that points should be served through designated airports. See, *e.g.*, Trans-Texas Certificate Renewal Case, 12 C.A.B. 606 (1951). * * *." (Petition, Appendix A, pp. 7, 8).

The dissenting judge expressed the view that in the absence of specific notice of a proposed designation, petitioners were entitled to rely upon the airport notice procedure prescribed in the Board's regulations (Appendix A, *infra*, pp. 12, 13). In answering this position the Court stated that since the Board had the statutory power to designate Dallas-Fort Worth as a single point, to be served through Amon Carter Air Field, the airport notice procedure was not and could not have been relied upon by the petitioners. The Court held that the airport notice procedure

> "* * * applies only when the holder of a certificate desires to serve a point named in the certificate through an airport not then regularly used by the holder. Since it comes into play only on the filing of an 'airport notice' by the holder, that procedure is plainly inapplicable where, as here, the Board has determined that service by the holder to a point named in the certificate should be through a particular airport." (Petition, Appendix A, p. 8).

The majority of the Court held that failure of petitioners to receive specific notice did not deprive petitioners of pro-

cedural due process for the further reason that in their petition to the Board seeking reconsideration, petitioners failed to specify any additional evidence they would have supplied had they had specific notice (Petition, Appendix A, p. 9). While at pages seven and eight of their petition for certiorari petitioners undertake to detail certain evidence which presumably they regard as pertinent, no such specification was made in their petition for reconsideration to the Board (R. 267).

Petitioners do not now contest, as they did in the Court of Appeals, the Board's power to designate Dallas-Fort Worth as a single point to be served through Amon Carter Air Field. Nor do petitioners now contend that the Board's decision was not based upon substantial evidence. Thus limited, the petition for certiorari raises the narrow question of whether petitioners had adequate notice that Central might be certificated to serve both Dallas and Fort Worth through the single, centrally-located airport, Amon Carter Air Field.

ARGUMENT

On the basis of the facts, the decision of the Court of Appeals that petitioners received adequate notice is correct. There is no conflict with any decision of this Court. Determination by this Court of the procedural due process question raised by the petition is not necessary for the future guidance of the Civil Aeronautics Board in carrying out its congressionally imposed functions.

Petitioners assert that the Court of Appeals' decision is in conflict with the decision of this Court in the *State* case.[5] In striving to show this conflict petitioners make several comparisons by which they attempt factually to distinguish the two cases. The distinction denominated "perhaps the most important" (Petition, p. 11) involves the contention that petitioners had a right to rely upon the airport notice procedure because of the usual practice of the Board to follow such procedure in the designa-

[5] 332 U.S. 572.

tion of airports. Petitioners' position appears to be that in the *State* case[4] there was no such established practice involved.

This contention is disposed of in the majority opinion (Petition, Appendix A, p. 8) where it is stated, in effect, that the exercise by the Board of its power to specify an airport as a point foreclosed and made unnecessary the use of the airport notice procedure. Petitioners were charged with having notice of such a fundamental proposition of logic and law. They did not, therefore, have the right to expect that—once the Board exercises its statutory power—the selection of an airport through the airport notice procedure is another step to be taken. The evidence of record summarized in this brief shows the remaining alleged factual distinctions to be without merit.

A final determination by this Court of the procedural due process question raised by the petition is not necessary because the Board had before it a record which clearly indicated that petitioners were or should have been fully aware of the possibility that the Board might certificate Central to serve both Dallas and Fort Worth through Amon Carter Air Field. Central's application, including the prayer, was in the broadest possible terms. Petitioners were familiar with this application and participated fully in the proceeding before the Board. The record is replete with evidence concerning Central's possible use of Amon Carter Air Field. In numerous past proceedings, including proceedings in which petitioners participated, the Board had either certificated contiguous cities as a single point for air service or specified that a point should be served through a designated airport. Petitioners had, in fact, undertaken to block construction of Amon Carter Air Field.[5]

---

[4] 338 U.S. 572.

[5] See the quotations from the Board's and Court of Appeals' opinions at pp. 4, 5, 6, *supra*, for specification of other evidence of record directed to the issue of designation of the single airport, Amon Carter.

In view of the foregoing it can hardly be contended that Dallas did not have sufficient notice from which it knew or should have known that the Board might exercise its statutory power and certificate Central to serve Dallas and Fort Worth through Amon Carter.

The case which the petition seeks to have this Court review involves local service of a temporary, experimental nature. Additional unique circumstances include, among others, the contiguous geographical location of Fort Worth and Dallas and the availability of a centrally-located airport between the two cities.

One fatal flaw in the petition is its failure to suggest any advantage which might result from intervention by this Court in the situation. If any additional warning was needed that the Board may in certification cases, if it thinks best, provide for service to contiguous cities through one centrally-located airport, the decision below obviously serves that purpose.

Petitioners' contention that the case presents an encroachment by the Federal Government on the affairs of local governments and of private airline enterprise is without merit. Since the Board concededly has the power to designate airports as points to be served by an air carrier it matters little whether the authority is exercised in certification cases or later airport notice proceedings. Central, the air carrier to which the Board directed its order, has raised no objection and, in fact, intervened in the Court below to support the validity of the Board's order.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Clovis A. Stearns, Jr.
Plummer A. Bassett
912 American Security Building
Washington 4, D. C.
Counsel for Intervenors, The City of Fort Worth and Fort Worth Chamber of Commerce

December 13, 1954

[redacted]

[redacted]

[redacted]

an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Authority [Board], between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Authority [Board].

II.

Section 202.3 of the Economic Regulations of the Civil Aeronautics Board (issued March 18, 1943, recodified July 1, 1949, 14 C.F.R. 738):

"(a) *Airport notice.* If the holder of a certificate desires to serve regularly a point named in such certificate through the use of any airport not then regularly used by such holder, such holder shall file with the Board written notice of its intention so to do. Such notice shall be filed at least 30 days prior to inaugurating the use of such airport. Such notice shall be conspicuously entitled Airport Notice, shall clearly describe such airport and its location, and shall state the reasons the holder deems the use of such airport to be desirable. The use of such airport may be inaugurated 30 days after the filing of such notice, unless the Board notifies the holder within said 30-day period that it appears to the Board that such use may adversely affect the public interest, in which event such use shall not thereafter be inaugurated (except as may be expressly permitted by such notification) unless and until the Board finds, upon application filed by the holder, that the public interest would not be adversely affected by such use. The Board may permit the use of an airport at any time after the filing of the Airport Notice whenever the circumstances warrant such action. In no event shall the holder use the provisions of this paragraph as authority to receive passengers at one airport and discharge such passengers at any other airport serving the same point.

"(b) *Service of notice.* A copy of each Airport Notice shall be served upon such persons as the Board may desig-

nate in a particular case, and shall be served upon the following persons in all cases:

"(1) The Postmaster General, marked for the attention of the Second Assistant Postmaster General;

"(2) Each scheduled air carrier which regularly renders service to or from the point intended to be served through the proposed airport;

"(3) The chief executives of the city (or other political subdivision) and of the State, in which are located the currently used airport, the proposed airport, and the point to be served, respectively. (If there be a state commission or agency having jurisdiction of transportation by air, notice shall be served on such commission or agency rather than on the chief executive of the State.)"

FILED
DEC 9 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 440

THE CITY OF DALLAS AND DALLAS CHAMBER OF COMMERCE, *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

CENTRAL AIRLINES, INC., THE CITY OF FORT WORTH, TEXAS, AND FORT WORTH CHAMBER OF COMMERCE, *Interveners.*

STATEMENT ON BEHALF OF THE AIRPORT OPERATORS COUNCIL, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

LEANDER I. SHELLEY,
Attorney for Airport Operators Council.
30 Broad Street
New York 4, N. Y.

Of Counsel:
ROBERT C. MAYER,
Washington, D. C.

Dated: December 8, 1954.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

Supreme Court of the United States

OCTOBER TERM, 1954

No. 440

THE CITY OF DALLAS AND DALLAS CHAMBER OF COMMERCE, *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

CENTRAL AIRLINES, INC., THE CITY OF FORT WORTH, TEXAS, AND FORT WORTH CHAMBER OF COMMERCE, *Interveners.*

STATEMENT ON BEHALF OF THE AIRPORT OPERATORS COUNCIL, AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

---

1. The Airport Operators Council is an association of the operators of the major airports of the country. Annexed hereto as Appendix A is a list of the members and the airports operated by them. As can be seen, all of the members of the Council are public and governmental boards, departments, commissions, agencies or authorities, with the single exception of Lockheed Air Terminal Inc., a private corporation which operates the Burbank, California Airport.

The airports operated by the members of the Council include all of the major civil airports of the country. They are typically high density airports, by which is meant airports having a high incidence of arrivals and departures.

Practically all form part of the National Airports Plan envisioned by Section 3 of the Federal Airport Act.

From the standpoint of geographical location, the airports operated by members of the Council have a nationwide distribution from Boston, New York, Baltimore, Miami on the east, to Seattle, San Francisco, Los Angeles and Honolulu on the west. Any issue affecting all of the members of the Council is *per se* national in its scope.

2. Simply stated, the question involved in the present case is whether Congress intended that the issues in proceedings pursuant to Section 401 of the Civil Aeronautics Act of 1938 should be defined with reasonable certitude, and that reasonably adequate public notice thereof should be given.

In the present case, Central Airlines, Inc. applied to the Civil Aeronautics Board for a certificate

> "* * * to authorize the air transportation of persons, property, and mail over the following route segments:
>
> (1) Between the terminal point Fort Worth, Texas, the intermediate points Dallas, Texas, Denton, Texas, Duncan, Oklahoma, Lawton-Fort Sill, Oklahoma, Chickasha, Oklahoma, and the terminal point Oklahoma City, Oklahoma." (Joint Appendix to Briefs in the United States Court of Appeals, pages 3 and 4).

The certificate issued by the Board authorized the Central Airlines, Inc.

> "* * * to engage in air transportation with respect to persons, property, and mail, as follows:
>
> * * * Between the terminal point Oklahoma City, Okla., the intermediate points Chickasha, Lawton, Fort Sill, and Duncan, Okla., and the terminal point Dallas-Fort Worth, Tex. (to be served through the Amon Carter Air Field)". (Petition for Writ of Certiorari, pages 15-16.)

The apparent intent and effect of the certificate was not only to designate the terminal point, but also to limit the

operations of the Airline at that terminal point to the Amon Carter Air Field and to prevent the Airline from using Love Field which is operated by the City of Dallas. The City of Dallas and the Dallas Chamber of Commerce complain that they had no adequate notice that the question of restricting the Airline to the use of Amon Carter Field was a question to be decided in the proceeding.

3. Whether or not the statute required that notice be given that this issue was involved in the proceeding, and whether adequate notice was in fact given, are questions for argument before this Honorable Court after the writ is granted. The Airport Operators Council feels it would be inappropriate to enter into any argument on these points in this statement, beyond pointing out that a reading of the petition for the writ indicates that the questions are substantial and arguable.

In support of the petition for the writ, however, the Airport Operators Council respectfully points out that the questions involved transcend any local disputes between the City of Dallas and the City of Fort Worth. In the ultimate analysis they present the question whether under the Civil Aeronautics Act of 1938 members of the general public are entitled to reasonably adequate and definite notice of the questions which are to be decided in route proceedings before the Civil Aeronautics Board, to the end that they may decide whether or not they will become parties, what evidence they will introduce and how they will conduct themselves in other respects.

The airports of this country are normally interested in the result of route proceedings before the Civil Aeronautics Board, and in many instances they intervene. As can been seen from the petition for the writ, there is room for disagreement and argument as to the interpretation of the Act with respect to notice to parties and potential parties. Such uncertainty can only serve to confuse parties to route proceedings, to promote litigations and appeals,

and in general to delay the issuance of certificates under Section 401. The public interest would appear to require that these uncertainties be removed by an authoritative ruling of this Honorable Court to the end that all concerned may guide themselves thereby.

For these reasons, the Airport Operators Council believes that the questions involved are substantial and of national scope, and that the petition for the writ should be granted.

4. If the writ is granted, the Airport Operators Council intends to apply for further permission to file a brief with respect to the questions which will then be before this Honorable Court.

The Airport Operators Council however does not take and does not intend to take any position with respect to the controversy between the City of Dallas and the City of Fort Worth as to whether the Airline's operations should be confined to Amon Carter Field. The Council's sole interest is in the question which is of such importance to its members and to the general public,—whether the statute requires reasonably adequate notice to be given as to the questions to be decided in route proceedings, and what constitutes such reasonably adequate notice.

5. In conclusion, for the reasons hereinbefore set forth, it is respectfully urged that the writ of certiorari be granted.

Respectfully submitted,

LEANDER I. SHELLEY,
Attorney for Airport Operators Council.
30 Broad Street
New York 4, N. Y.

Of Counsel:

ROBERT C. MAYER,
Washington, D. C.

Dated: December 8, 1954.

APPENDIX A

List of Members of Airport Operators Council and Airports Operated by Them.

(Except as otherwise noted, the city at which the airport is located is the AOC member)

ATLANTA, GA.
Atlanta Municipal Airport

BALTIMORE, MD.
Friendship International Airport

BIRMINGHAM, ALA.
Birmingham Municipal Airport

BOSTON, MASS.
State Airport Management Board
Logan International Airport

BURBANK, CALIF.
Lockheed Air Terminal, Inc.

CHICAGO, ILL.
Midway Airport
O'Hare International Airport

CLEVELAND, OHIO
Cleveland Hopkins Airport

DENVER, COLO.
Denver Stapleton Airfield

HONOLULU, HAWAII
Hawaii Aeronautics Commission
Honolulu International Airport

HOUSTON, TEXAS
Houston Municipal Airport

JACKSONVILLE, FLA.
Imeson Municipal Airport

KANSAS CITY, MO.
Kansas City Municipal Airport

LOS ANGELES, CALIF.
Los Angeles International Airport

LOUISVILLE, KY.
Louisville & Jefferson County Air Board
Standiford Field

MEMPHIS, TENN.
Memphis Municipal Airport

MIAMI, FLA.
Dade County Port Authority
Miami International Airport

MILWAUKEE, WIS.
Milwaukee Municipal Airport

MINNEAPOLIS-ST. PAUL, MINN.
Minneapolis-St. Paul Metropolitan Airports Commission
Minneapolis-St. Paul Airport

NASHVILLE, TENN.
Nashville Municipal Airport

NEWARK, N. J.
The Port of New York Authority
Newark Airport

NEW YORK, N. Y.
The Port of New York Authority
LaGuardia Airport
New York International Airport

OAKLAND, CALIF.
Port of Oakland Authority
Metropolitan Oakland International Airport

OKLAHOMA CITY, OKLA.
Will Rogers Field

OMAHA, NEBR.
Omaha Municipal Airport

PHILADELPHIA, PA.
Philadelphia International Airport

PITTSBURGH, PA.
County of Allegheny
Greater Pittsburgh Airport

PORTLAND, ORE.
The Port of Portland
Portland Municipal Airport

ST. LOUIS, MO.
St. Louis Municipal Airport

SAN ANTONIO, TEXAS
San Antonio International Airport

SAN FRANCISCO, CALIF.
San Francisco International Airport

SAN JUAN, PUERTO RICO
Puerto Rico Transportation Authority
San Juan Airport

SEATTLE, WASH.
Port of Seattle Commission
Seattle-Tacoma Airport

TAMPA, FLA.
Hillsborough County Aviation Authority
Tampa International Airport

TOLEDO, OHIO
Toledo Municipal Airport

TULSA, OKLA.
Tulsa Municipal Airport

WASHINGTON, D. C.
Civil Aeronautics Administration
Washington National Airport

WICHITA, KANSAS
Wichita Municipal Airport

FILED
DEC 13 1954
HAROLD B. WILLEY, C

No. 440

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

THE CITY OF DALLAS AND DALLAS CHAMBER OF COMMERCE, *Petitioners,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

CENTRAL AIRLINES, INC., THE CITY OF FORT WORTH, TEXAS, AND FORT WORTH CHAMBER OF COMMERCE, *Interveners.*

BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

HERMAN C. WILSON
City Attorney
Greensboro, North Carolina

WALTER J. MATTISON
City Attorney
Milwaukee, Wisconsin

J. ELLIOT DRINARD
City Attorney
Richmond, Virginia

NIEMOND F. KELLER
City Solicitor
Waynesboro, Pennsylvania

DALE H. FILLMORE
Corporation Counsel
Dearborn, Michigan

FRED G. STICKEL, III
Counsel
Cedar Grove, New Jersey

J. W. ANDERSON
City Attorney
Chattanooga, Tennessee

BARNETT I. SHUR
Corporation Counsel
Portland, Maine

ALEXANDER G. BROWN
City Attorney
Portland, Oregon

A. C. VAN SOELEN
Corporation Counsel
Seattle, Washington

CHARLES S. RHYNE
General Counsel, NIMLO
726 Jackson Place, N. W.
Washington 5, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
STATEMENT	1
ARGUMENT	2
Failure of the Civil Aeronautics Board to Give Notice to and Permit the City of Dallas to be Heard Was a Violation of the Due Process Clause of the Federal Constitution	2
CONCLUSION	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 440

THE CITY OF DALLAS AND DALLAS CHAMBER OF COMMERCE,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

CENTRAL AIRLINES, INC., THE CITY OF FORT WORTH, TEXAS, AND FORT WORTH CHAMBER OF COMMERCE, *Interveners.*

BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN BEHALF OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

STATEMENT

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of more than 900 municipal corporations who are political subdivisions of the 48 states, Hawaii, Alaska, Puerto Rico, and the District of Columbia. The purpose of the organization is to further the interests of municipalities on a national scale. This brief is filed under Rule 42(4) of the Revised Rules of this

Court. The members of NIMLO are political subdivisions of States and this brief is sponsored by their authorized law officers.

The Executive Committee of NIMLO has authorized the filing of this brief because it believes that this case involves matters of fundamental constitutional principle which affect all municipalities throughout the nation. The right to notice and hearing—a right which was on this record denied to the City of Dallas—is a fundamental principle of our system of government guaranteed under the Federal Constitution. Denial of this right to the City of Dallas in this case is believed to be a violation of the Constitution of the United States.

ARGUMENT

Failure of the Civil Aeronautics Board to Give Notice to and Permit the City of Dallas to be Heard Was a Violation of the Due Process Clause of the Federal Constitution

The Civil Aeronautics Board has for years followed the well-understood policy of refraining from using its broad powers to determine civil airline routes to dictate to airlines and to municipalities the particular airport which must be used to serve a community. The reason for this is presumably to permit growth and change to take place freely at a local level. It is consistent with the philosophy of our Government that the Civil Aeronautics Board proceed on the assumption that privately owned airlines will be sensitive to local community requirements and will respond thereto in determining whether to serve a community certificated by the Board through one airport or another.

The Order of the Civil Aeronautics Board in this case, *Central Renewal Proceeding*, Docket No. 4083, et al., departs from this established policy in that it prohibits the use of one of the most active civil airports in the country for reasons of traffic convenience and operating efficiency, both matters of judgment peculiarly within the competence of the officials of the airline and municipality concerned. If

this represents a new policy and attitude of the Civil Aeronautics Board and if it is put into practice without notice and hearing, as claimed by the City of Dallas, it has profound significance to the growing number of air centers which have more than one airport within a distance which the Board may decide is "adequate" or "convenient." These communities are entitled to know when and how the policies of the Federal Government affect their interests. They are entitled to a fair opportunity to contest those policies, if an actual or potential conflict with local interests exists.

If, as appears from the record in this case, such a change in policy of the Civil Aeronautics Board has been made without announcement or explanation and has been applied without clear notice of what the Board is about and without a full opportunity for hearing and recording evidence and expert opinion from the municipalities and airline affected, then the resulting effect on many air centers in the country is immediate, significant and deserving of the attention of this Court. Each of the important air centers is intermittently involved in the continuing parade of route certification proceedings before the Civil Aeronautics Board. Municipalities are not organized and financed to maintain continually their guard against Federal resolution of their problems in constantly recurring legal proceedings. Furthermore, it is not in the public interest that they be subjected to such expense and uncertainty, merely because the Civil Aeronautics Board has deliberately or inadvertently failed to give notice to the public of fundamental changes in policy and of the scope of legal proceedings as they affect local interests.

The extent of this burden is fairly indicated by the current involvement of the City of Dallas in four route certification proceedings in which the use of the Dallas Love Field has been or could be involved (Page 13 of the Dallas Petition). The prospect of litigation before the Board, or before the Courts if necessary, as a continuing process of

maintaining a local voice in local affairs is profoundly disquieting to the large and growing number of communities dependent on civil air transportation. The law of due process under our Constitution and statutes has been developed to provide protection against just such predicaments as this.

CONCLUSION

It is respectfully suggested that this Court should grant the petition for certiorari in this case and order the Civil Aeronautics Board to grant the City of Dallas an opportunity to be heard in this case. Only in this way can the important issue involved be decided fairly, upon a record, and in keeping with the due process of law which is required by the Federal Constitution. Denial of notice and hearing in this case makes this case one of national importance.

Respectfully submitted,

HERMAN C. WILSON
City Attorney
Greensboro, North Carolina

WALTER J. MATTISON
City Attorney
Milwaukee, Wisconsin

J. ELLIOT DRINARD
City Attorney
Richmond, Virginia

NIEMOND F. KELLER
City Solicitor
Waynesboro, Pennsylvania

DALE H. FILLMORE
Corporation Counsel
Dearborn, Michigan

FRED G. STICKEL, III
Counsel
Cedar Grove, New Jersey

J. W. ANDERSON
City Attorney
Chattanooga, Tennessee

BARNETT I. SHUR
Corporation Counsel
Portland, Maine

ALEXANDER G. BROWN
City Attorney
Portland, Oregon

A. C. VAN SOELEN
Corporation Counsel
Seattle, Washington

CHARLES S. RHYNE
General Counsel, NIMLO
726 Jackson Place, N. W.
Washington 5, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 440

THE CITY OF DALLAS and DALLAS CHAMBER OF COMMERCE,
Petitioners,

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

CENTRAL AIRLINES, INC., THE CITY OF FORT WORTH, TEXAS, and FORT WORTH CHAMBER OF COMMERCE, *Intervenors.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY BRIEF FOR THE CITY OF DALLAS AND DALLAS CHAMBER OF COMMERCE

In reply to the briefs of the Civil Aeronautics Board, Respondent, and the City of Fort Worth, Texas and Fort Worth Chamber of Commerce, Intervenors, in opposition to the petition for a writ of certorari to the United States Court of Appeals for the District of Columbia Circuit in the

above-entitled case, Petitioners wish briefly to place before this Court certain considerations in support of their petition for a writ of certiorari.

Respondent and Intervenors rely almost entirely, in their respective briefs in opposition, on the reasoning of the Court below, the decision of which this Court is being asked to review. Respondent has undertaken to summarize, at page 6 of its brief, the conclusions of the Court below that "petitioners had fully participated in the instant proceedings, that they were familiar with the construction of Amon Carter field, that they had participated in other Board proceedings in which the certificate had specified that particular points should be served through designated airports, and that Central officials had testified extensively at the hearing as to their plans for using Amon Carter field upon its completion" and, therefore, that Petitioners had been sufficiently alerted to the possibility that service might be certificated to "Dallas-Fort Worth" through "Amon Carter Field". Suffice it to point out that the fact of participation in the proceeding is irrelevant to the question of whether notice and a hearing, encompasing the airport designation issue as distinct from route certification questions, is required; knowledge that Fort Worth was building a new airport is not notice that the Civil Aeronautics Board might arbitrarily and without notice prohibit the use of Dallas Love Field; participation in other Board proceedings where the certificate had specified that particular points be served through designated airports does not constitute notice that the Board might prohibit service to a certificated community through the airport which has theretofore handled a major part of that community's traffic (as pointed out at p. 15 of the petition, there has been no parallel to the present case); and testimony by Central officials that they plan to use the Fort Worth International Airport *and* the Dallas Love Field (*ante*, p. 3), in the absence of any evidence controverting the soundness of plans to use Love Field,

was entirely consistent with the assumption throughout the hearings that Dallas would be served through Love Field and Forf Worth through its airport.

An integral part of the notice and hearing question which this Court is asked to consider is whether in fact substantial evidence on the airport issue was made available to the Board.[1] It is notable that none of the sweeping references to evidence of record in the opinion of the Court below and in both of the briefs in opposition makes any references to the record. Petitioners have identified in their petition (Pet. 7, 8) the matters which the Board should obviously have considered, but did not, before undertaking to prohibit the use of either the Fort Worth or Dallas airport. It is abundantly clear from the record of this case that the Board has either acted on information which is not of record or has mistakenly conceived the problem as a simple matter of comparative distances between route points and between the airports and the downtown centers of the two cities.

At page 8 of their brief in opposition, Intervenors allege that the record is "replete with evidence concerning Central's possible use of Amon Carter Air Field". In fact, the only evidence in the stipulated record on Central intentions towards the possible use of the Fort Worth International Airport is the following testimony by Keith Kahle, President of Central Airlines (J.A. 120):

> ". . . We contemplate serving Metchum [sic] Field at Fort Worth, Midway and Love Field at Dallas.
>
> "There is also the possibility that we would miss Midway on certain flights. . . ."

In the closely comparable and more recent *Service to Fayetteville Case*, Docket No. 5592, *et al.*, Central Airlines

---

[1] Petitioners have not abandoned the point, as contended by Intervenors at page 7 of their brief in opposition, that the Board issued its order without substantial evidence on the airport question (Pet. 6-9). In the interest of clarity and simplicity, Petitioners have treated this issue as subordinate to, and merged with, the denial of notice and a hearing and have limited their statement of the question presented accordingly (Pet. 2).

has applied to the Board for an exemption from a prohibition against the use of Dallas Love Field identical to that in the present case, offering its estimate that denial of service to Love Field would increase Government subsidy costs by at least $16,000 per year. The contradiction between airline management judgment and the Board's conclusions regarding subsidies, based on a superficial measure of comparative air mileages, in the *Fayetteville* case is suggestive of the need in the present case for testimony by Central officials on the effect on revenues and operating costs of eliminating Love Field (Items 6 and 7, Pet. 8).

Both Respondent (p. 6 of its brief) and Intervenors (p. 5 of their brief) rely heavily on the following language of the Court below summarizing the decision of this Court in *Civil Aeronautics Board* v. *State Airlines*, 338 U.S. 572 (1950):

> "... that the requirements of notice are satisfied when interested parties are sufficiently informed of the issues so that they may present evidence which will enable the Board to reach its decision on the basis 'of all available information'." (Pet. App. 7)

Petitioners agree and strongly urge the application of this principle to the present case. That is precisely the gravamen of the petition in this case, and it is the basis for the distinction between the *State* case and the present case.

Both Respondent (p. 10 of its brief) and Intervenors (p. 8 of its brief) rely upon the reasoning of the Court below that, because the Board exercised its power to specify an airport as a point, Petitioners had no basis to rely on the Board's established procedure of naming cities as points in route certifications and leaving selection of airports to the Board's Airport Notice procedure. This argument completely evades the argument of Petitioners, which is that, *in the absence of notice* that the Board proposed to short circuit its established procedure and decide the airport issue in the route certification proceed-

ing, Petitioners were entitled to rely on the Airport Notice procedure. It is no answer to say, as the Court below did, that the Board exercised its power to name an airport in the certification case, unless that power was exercised with due regard for the requirements of notice and hearing.

The briefs in opposition urge that Dallas is not hurt by the Board's order and that there is no general public stake in the case here at issue. Intervenors merely assert this. Respondent argues it in a curious fashion. It seems to be saying, at page 7 of its brief, that it is only rarely that the Board designates an airport (Petitioners agree) and, therefore, whether there is notice that a route certification proceeding might encompass the possible selection of airports is of no great importance. It is strangely unpersuasive for an administrative agency addressing itself to the Supreme Court to urge that its failure to give adequate notice does not merit the Court's attention because it does not intend to do it very often. The municipal air centers of this country, which must fact this lack of restraint by the Board in failing to give notice in circumstances such as this, can take little comfort from the Board's assertion that it seldom happens unless the Board is prepared to declare and abide by some consistent policy which rules when it will happen. Whether the Board's action in this case and the decision of the Court below have been a cause of deep concern to those most directly affected can be best judged by two briefs filed in this case as *amicus curiae* by the Airport Operators Council and the National Institute of Municipal Law Officers.

With respect to the assertion that Petitioners have not been sufficiently hurt by the Board's order in this case, Respondent effectively brings out the difficult position in which it has placed Petitioners by pointing out, at page 8 of its brief, that Petitioners "are now fully on notice of the extent to which service through Amon Carter is an issue" in four pending proceedings and, presumably, in any future cases. Without burdening this record with the extended procedural complications of Petitioners' at-

tempts to determine whether and to what extent the airport issue might be present in each of these pending cases, suffice it to say that an announcement in this case that the airport question is from here on likely to be in issue in route certification proceedings is an unnecessary and unwarranted imposition of the heavy financial burden of preparing the airport case in the differing circumstances of each future route certification proceeding, merely because the Board will not differentiate between notice of a route certification proceeding and notice of an airport designation.

Petitioners are concerned that it is a matter within the Board's discretion whether to give notice and hold hearings on the designation of an airport in the Dallas-Fort Worth area, particularly in view of what appears to be a developing pattern in Board orders to transfer local service traffic from Dallas Love Field to Fort Worth International Airport. If the Board succeeds in accomplishing this, the necessity of the trunkline carriers to connect with local service carriers will complete a substitution of the Fort Worth International Airport for the Dallas Love Field. Petitioners believe that this should not be accomplished through Federal fiat, but rather through the gradual evolvement of traffic needs and the response of the airlines. In any case, however, a matter of such far-reaching local significance clearly demands full and fair hearings as a matter of right and not as a matter of whim. It can hardly be said that Dallas' interest in this case is limited to the Central Airlines' schedules of Segment 5 of Route No. 84.

In Conclusion, it is respectfully urged, for the reasons set forth in the petition for a writ of certiorari, as supplemented in this reply brief, that the petition be granted.

Respectfully submitted,

Brackley Shaw,
1426 G Street, N. W.,
Washington 5, D. C.,
Attorney for Petitioners

January 7, 1955